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ABSTRACT

Handicapped students are now protected by specific statutes in addition to the broad constitutional protection offered all students. As the number of related statutes, regulations, and case law decisions grew, assimilation became increasingly difficult. This publication attempts to meet educators' need for a succinct guide in special education law. The first chapter presents the historical background and summarizes the three most important "laws" affecting handicapped children: the Fourteenth Amendment; section 504 of The Rehabilitation Act of 973; and The Education of the Handicapped Act, as amended by Public Law 94-142. Chapter 2 discusses the controversies over handicapped students regarding identification, evaluation, individualized education program (IEP) preparation, placement, and procedural safeguards. The topic of chapter 3 is federal law compliance in the matter of student records--access rights, accessible records, and amending records--along with policy requirements for school boards. When and how handicapped students may be disciplined by school officials is examined in chapter 4. Legal issues, in regard to minimum competency testing, that affect handicapped students are discussed in chapter 5. The final chapter discusses physical education and sports participation by handicapped students. A table of cases precedes the main body of the book, and an index is appended. (Author/MLF)

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Legal Issues in Special Education

Stephen B. Thomas

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Foreword

Special education law has emerged as an area in and of itself over the past ten years. Handicapped students are now protected by specific statutes in addition to the broad constitutional protection offered all students. As the number of related statutes, regulations, and case law decisions grew, assimilation became increasingly difficult. Educators were being held responsible for violations of laws which had neither been fully explained nor comprehended.

To complicate this problem, a dearth of literature in special education existed for several years. Today, there are many related materials available, most of which are both lengthy and expensive. Many educators have expressed a need for an affordable, succinct publication to provide them with "the basics" in special education law. This publication was prepared in an attempt to help fill this void. It covers areas that are, according to the author, of great importance, interest, and controversy. The publication is recommended (1) for the educator to assist in the development of related policy; (2) for the student to acquire a general introduction; and (3) for the attorney to receive background information and a general understanding of the educational process.

Stephen B. Thomas

About The Author

Dr. Stephen B. Thomas graduated from the University of Florida in 1974, where he received his doctorate in educational administration while emphasizing school law and school finance within his program. Since that time he has taught at the university level and currently is serving as Professor within the Division of Administrative and Instructional Leadership at St. John's University, Jamaica, New York. While at St. John's, Dr. Thomas has developed five school law related classes, including a class in Special Education Law.

In addition to teaching, Dr. Thomas has been a consultant to several state departments of education, national organizations, and school districts. He has presented papers at a variety of national and regional conferences, has published extensively, has conducted a number of funded research studies, and has edited several books and journals. Dr. Thomas is a member of the authors committee for West's *Education Law Reporter* and will serve as chairperson of the NOLPE publications committee during 1985. Also, he is the editor of *The Yearbook of School Law* and a member of the Board of Directors of NOLPE.

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Introduction and History

Although the Declaration of Independence over two hundred years ago guaranteed that Americans have the right to life, to liberty, and to the pursuit of happiness, that right has not been uniformly available to all citizens. As the adage purports, although all are created equal, some are created more equal than others. As a group, handicapped persons have received unequal treatment by being victims of both intentional and unintentional discrimination. Historically, it was more convenient, both legislatively and socially, to remove the handicapped from the social mainstream than it was to integrate them in public schools or to provide them with jobs or training.

This attitude toward the handicapped permeated federal, state, and local governments, which systematically segregated or excluded handicapped persons through a variety of means. Laws were enacted, and several remain, that restrict the right to immigrate, to vote, to obtain a drivers license, to purchase a hunting or fishing license, to enter courts, to hold office, and, for newborn infants, to live.[1] Also, numerous states selectively restricted or denied to handicapped persons the right to enter into contracts, based on an irrebutable presumption of incapacity. One of the earliest reported cases of this type was in 1821 in Connecticut where the court decided a related issue concerning a person who was deaf, dumb, and blind. The court reasoned that such a person is "considered in law as incapable of any understanding, being deficient in those inlets which furnish the human mind with ideas."[2]

During the late 1950's, twenty-eight states required persons with feeblemindedness, epilepsy, idiocy, imbicility, or insanity to be sterilized. Numerous other states proscribed marriages between handicapped persons or where one of the parties was mentally ill, mentally retarded, or epileptic. As recently as 1952, a Kentucky decision[3]

1. *See* Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a 'Suspect Class' under the Equal Protection Clause*, 15 Santa Clara L. Rev. 855 *passim* (1975), for a related discussion.

2. Brown v. Brown, 3 Conn. 299 (1821).

3. Beddow v. Beddow, 257 S.W.2d 45, 48 (Ky. 1952).

quoted with approval the language of an 1834 ruling which observed that "[a] person 'of unsound mind' . . . is, as to all intellectual purposes, dead; and such a thing, destitute of intellectual light and life, is as incapable as a dead body of being a husband or a wife in a legal, rational, or moral sense."[4]

Also of note were a Chicago Municipal Code, repealed in 1974, which made it unlawful for a person who was "diseased, maimed, mutilated or in any way deformed so as to be an unsightly or disgusting object or improper person to be allowed in or on the public ways or other public places,"[5] and a Wisconsin law, repealed in 1947, which gave the superintendent of each home for the mentally retarded the authority to order exploratory brain surgery following the death of a resident, if such an examination were considered beneficial to scientific research.[6]

In education, as in society, the handicapped were segregated, excluded, or poorly treated. Although Horace Mann believed that every person has a natural law right to an education,[7] history has shown that few handicapped children were provided with such an opportunity prior to the 1970's.

Formal public education began in Massachusetts in 1647. As public schools grew in number, many became quite diversified. Nevertheless, educators seldom were willing to adapt their programs to accommodate the handicapped; many school officials actually moved to restrict the admission of handicapped students or to have them expelled. Behavior that today would be determined by a placement committee to be a manifestation of a child's condition, historically was viewed as misbehavior requiring an appropriate punishment. For example, in 1893 a handicapped child in Massachusetts was suspended from school because he was "so weak in mind as not to derive any marked benefit from instruction" and because he was "troublesome to other children, making unusual noises, pinching others, etc." Also, he was found to be "unable to take ordinary, decent, physical care of himself."[8] The court compared his behavior which was ruled to have been caused by "incapacity and mental weakness," to that of a normal child who had "willfully and carelessly" violated school regulations. The court opined that although the situations differed

4. Jenkins v. Jenkins' Heirs, 2 Dana 102, 32 Ky. 102, 104 (1834).
5. Chicago, Ill., Mun. Code sec. 36-34 (1966) (repealed 1974).
6. Wis. Stat. Ann., sec. 52.04 (1930), as amended (1945) (repealed 1947).
7. Mann, Tenth Annual Report to Massachusetts State Board of Education, Old South Leaflets V, No. 109, 177-80 (1846).
8. Watson v. City of Cambridge, 157 Mass. 561, 32 N.E. 864 (Mass. 1893).

regarding student ability and motive, the result was the same — other scholars were being disturbed. Accordingly, the court upheld the suspension and labeled the action taken by the local school committee to be a "good faith act" aimed at eliminating disruptive students from the school environment. A similar case emerged from the Wisconsin Supreme Court in 1919. In that case, the court permitted the expulsion of a child with cerebral palsy because he had a "depressing and nauseating" effect on the teachers and students, and because he required an undue portion of the teacher's time.[9]

This situation began to change around 1900 when "special" classes became available which were intended to assist students who were experiencing learning difficulties; however, most students attending these classes did not have difficulty because of mental, emotional, or physical limitations, but were having difficulty because of language deficiencies. Accordingly, instruction often was more similar to that provided in either English-as-a-second-language or bilingual education classes than to that provided within individual education programs (IEPs). Nevertheless, because of these and other special programs handicapped children began attending school in greater numbers. Their presence gave educators the incentive and the opportunity to begin developing methods and materials for communicating and educating this newly accepted population of children.[10]

In 1911, the state of New Jersey became the first state to authorize in statute the establishment of classes for the mildly mentally retarded, although several cities already had initiated offerings for this and other special populations (e.g., Providence, Boston, Chicago). However, most of the early programs for the retarded accepted only that group of students classified as "educable." "Trainable" students required more individual attention and were not served, with few exceptions, until the late 1920's and 1930's, while "subtrainable" students still were excluded from almost all schools.

Over the next forty years, school districts dramatically expanded their special education offerings and admitted a growing number of handicapped children. Data from the Department of Education indicate that while only 12% of all handicapped children were served in 1948, 21% were served in 1963, and 38% were served in 1968.[11] By

9. Beattie v. Board of Educ. of City of Antigo, 169 Wis. 231, 172 N.W. 153, 154 (Wis. 1919).

10. Burgdorf & Burgdorf, *supra* note 1, at 873.

11. Weintraub & Ballard, Introduction: Bridging the Decades, Special Education in America: Its Legal and Governmental Foundations (1982), at 2.

1974, 83% of the seven million handicapped children of school age were receiving a formal education (however, approximately 45% of those attending school were receiving no special services.)[12] Although these percentages represent substantial improvement over the years, they were far from the "zero reject" plan proposed in the early 1970's. Given that handicapped persons, as a group, still were unsuccessful in acquiring "equal opportunity" in either employment or education, it is not surprising that *their reliance on "good intentions" was supplanted by their dependence on the courts.*

Relevant case law dates back only thirty years to a 1954 decision involving the segregation of racial minority students. In that case, *Brown v. Board of Educ. of Topeka*, the Supreme Court concluded that, "[i]n these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[13] The principles established in this case have been applied in a number of cases involving the handicapped, beginning in 1969 with *Wolf v. Legislature of the State of Utah*.[14] In that case, the judge not only identified education as the most important function of state and local governments, he also declared education to be a fundamental right under both the state and federal constitutions. Although the Supreme Court later was to disagree with the conclusion that education was fundamental under the United States Constitution,[15] this case, nevertheless, served as a presage for the forty plus cases to follow. Of these cases, two are of particular importance: *Pennsylvania Ass'n for Retarded Children (PARC) v. Pennsylvania*[16] and *Mills v. Board of Educ. of the Dist. of Columbia*.[17]

In the 1972 *PARC* case, a class action was initiated under 42 U.S.C. sections 1981 and 1983 (Equal Rights Under the Law[18] and Civil Action for the Deprivation of Rights,[19] respectively) on behalf of all retarded persons between the ages of six and twenty-one who were

12. Burgdorf & Burgdorf, *supra* note 1, at 875.
13. Brown v. Board of Educ. of Topeka, 347 U.S. 483, 493 (1954).
14. Civil No. 182646 (Utah 3d Jud. Dist. Ct., Jan. 8, 1969).
15. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).
16. 343 F. Supp. 279 (E.D. Pa. 1972).
17. 348 F. Supp. 866 (D.D.C. 1972).
18. Section 1981 states that "[a]ll persons within the jurisdiction of the United States shall have the same right in every [s]tate and [t]erritory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, exactions of every kind, and to no other."
19. Section 1983 states that "[e]very person who, under color of any statute, ordi-

excluded from public schools. The complaint was based on state statutory provisions which (1) relieved the state board of education of the responsibility to educate students who were classified as uneducable or untrainable by a public school psychologist; (2) permitted an indefinite postponement of admission to public school of children who had not attained the mental age of five years; and (3) excused children from compulsory attendance if a psychologist found them unable to profit from schooling, even though attendance was required of all children ages eight to seventeen. The consent agreement which resulted from the case stated that no child could be denied admission to a public school or have his educational status changed unless formal due process was provided. The parties agreed that mentally retarded persons are capable of benefiting from an education and that the state must provide them with a free public program of education and training appropriate to their capacity.[20] Furthermore, placement in the regular classroom was preferable to any of the more restrictive and segregative options.

Also in 1972 was a federal district court ruling based on the fourteenth amendment *(Mills)*. This decision was similar to the consent agreement in *PARC*, and expanded the right to an appropriate public education to children labeled as behavioral problems, mentally retarded, emotionally disturbed, and hyperactive. The court was particularly concerned that the insufficiencies of a school system not be permitted to bear more heavily on the exceptional or handicapped child than on the normal child;[21] that no child be totally excluded from publicly supported education; and that handicapped children not be denied an education without due process.[22]

Given the success of the plaintiffs in *PARC* and *Mills*, it was not surprising to see the filing of a myriad related complaints. Plaintiffs in such cases generally were successful and, as a result, were provided with programs designed to meet their unique needs. Where litigation

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nance, regulation, custom, or usage, of any [s]tate or [t]erritory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

20. Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 285 (E.D. Pa. 1972).

21. Mills v. Board of Educ. of the Dist. of Columbia, 348 F. Supp. 866, 876 (D.D.C. 1972).

22. *See* McCarthy & Thomas, *The Right to an Education: New Trends Emerging from Special Education Litigation*, 7 NOLPE Sch. L.J. 1 (1977) for a related discussion.

was neither present nor threatened, however, segregation or exclusion continued. Noncomplying districts often argued that funds were not available (or that they were unsure which governmental unit was to provide funds), that programs had not been developed, that existing faculty had not completed training, or that instructional materials and equipment either were not available or had not yet been received or purchased. Other districts, where state legislation was not sufficiently specific, restricted admission to only selected populations, required partial funding from the student, or maintained no specific timetable for testing, classifying, or placing. Students often complained of the dearth of offerings in residential institutions, misclassifications, unjust residency requirements, tuition reimbursement ceilings, and lack of due process.[23] Even though a number of states had passed related laws (70% by 1972, and all but two by 1975), there was no "great design" for all to follow. Most states had developed neither sufficient guidelines for compliance nor an administrative machinery capable of handling complaints.

Given this situation and the evolving prohandicapped public sentiment, the United States Congress began in 1965 to make more substantial its efforts to guarantee equal rights and due process for handicapped persons. Today, the three most important "laws" affecting handicapped children are the fourteenth amendment to the Federal Constitution, section 504 of The Rehabilitation Act of 1973, and The Education of the Handicapped Act, as amended by Public Law (P.L.) 94-142 in 1975.

Fourteenth Amendment

The fourteenth amendment to the United States Constitution prohibits states and their local subdivisions from denying to any person within their respective jurisdictions the equal protection of the law, or from taking life, liberty, or property without due process of the law. Because public schools are local subdivisions of the state, school personnel are required to treat similarly all classes of persons and to provide proper due process where liberty and property interests may be denied.[24]

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23. Burgdorf & Burgdorf, *supra* note 1, at 879-83.

24. Furthermore, the fifth amendment provides protection similar to that established by the fourteenth amendment, but has been interpreted by the courts to prohibit federal, rather than state, acts that deny due process. Although the fifth amendment does not contain a comparable equal protection clause, the Supreme Court has ruled that the two (due process and equal protection) are not mutually exclusive. Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

Equal Protection

If a government policy or law *facially discriminates* against an individual on the basis of a suspect classification (e.g., alienage, race, nationality[25]) or affects a fundamental right (an explicit or implicit constitutional right — e.g., to assemble, to vote, to procreate[26]), such provisions will be strictly scrutinized by the courts and will be justified only if a compelling interest can be proven. This level of scrutiny is based on the principle that certain actions must be subjected to close analysis in order to preserve equality and liberty. Although the compelling interest standard has, at times, been met,[27] scrutiny that is strict in theory generally is fatal in fact.[28]

If neither a suspect class nor a fundamental right is involved, the challenged act must bear only a rational relationship to a legitimate governmental objective. Under this standard, acts are invalid only if they are "clearly wrong, a display of arbitrary power, not an exercise of judgment."[29] It has been proponed that minimum scrutiny in theory is virtually none in fact.[30]

In addition to the two extreme standards (strict scrutiny and rational relationship), the Supreme Court has established an intermediate level of scrutiny which requires (1) the classification to serve important governmental objectives, and (2) the discriminatory acts to be substantially related to the achievement of those objectives.[31] This standard would be applied where the court is convinced that mere rationality is too lenient and that strict scrutiny is too demanding. A significant (thought not necessarily fundamental) interest allegedly would be infringed, while a sensitive (though not necessarily suspect) class would be involved. Because the Burger Court has been reluctant to increase the number of rights that are fundamental, or to identify additional classes that are suspect, the intermediate standard has been of particular importance to classes of persons who

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25. *E.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Hunter v. Erickson, 393 U.S. 385 (1969) (race); Korematsu v. United States, 323 U.S. 214 (1944) (nationality).

26. *E.g.*, Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92 (1972) (right to assemble); Reynolds v. Sims, 377 U.S. 533 (1964) (right to vote); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate).

27. Hirabayashi v. United States, 320 U.S. 81 (1943).

28. Gunther, *The Supreme Court, 1971 Term — Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972).

29. Mathews v. De Castro, 429 U.S. 181, 185 (1976).

30. Gunther, *supra* note 28.

31. Wengler v. Druggists Mutual Ins. Co., 443 U.S. 142, 150 (1980); Craig v. Boren, 429 U.S. 190, 197 (1976).

have sought protection from discriminatory practices (e.g., sex discrimination has been evaluated under this middle tier[32]).

It often has been argued that handicapped persons should be classified as a suspect class (or at least a quasi-suspect class) and that the rational relationship standard is too lenient for evaluating laws or policies affecting them.[33] Historically, federal courts have not agreed as to the "traditional indicia of suspectness," and numerous criteria have been proposed, both by the courts and by commentators. Select handicapped persons meet most, if not all, of these standards: they represent a discrete and insular minority;[34] they evoke stereotypes that carry the stigma of inferiority and a badge of opprobrium;[35] they often have conditions that are immutable;[36] they have been subjected to a history of purposeful unequal treatment;[37] they are in a position of political powerlessness;[38] and they often are "saddled" with physical, mental, and emotional disabilities, dependent upon the nature and severity of their respective handicaps.[39]

Notwithstanding the aforediscussed, handicapped persons have been identified as a suspect class (or a quasi-suspect class) only by select state courts and federal trial courts.[40] Most courts refuse to place handicapped persons in a suspect class, and require that only the rational basis test (or minimum scrutiny) be used to support allegedly discriminatory acts.[41] Although there are practices that have been disallowed under this low standard,[42] most acts will withstand such scrutiny.

In addition to having difficulty acquiring relief under the Constitution when a policy or law facially discriminates, handicapped vic-

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32. Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

33. *E.g.* Burgdorf & Burgdorf, *supra* note 1; Comment, *The Equal Protection and Due Process Clauses: Two Means of Implementing "Integrationism" for Handicapped Applicants for Public Employment*, 27 De Paul L. Rev. 1169 (1978).

34. United States v. Carolene Prod. Co., 304 U.S. 144, 152-53 n.4 (1938).

35. *See, e.g.*, Black, *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421, 424 (1960).

36. *See, e.g.*, Weber v. Aetna Casualty and Sur. Co., 406 U.S. 164 (1972).

37. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

38. *Id.*

39. *Id.*

40. *See, e.g.*, Sterling v. Harris, 478 F. Supp. 1046, 1052-53 (N.D. Ill. 1979); Frederick L. v. Thomas, 408 F. Supp. 832, 836 (E.D. Pa. 1976); Fialkowski v. Shapp, 405 F. Supp. 946, 958-59 (E.D. Pa. 1975); *In re* G.H., 218 N.W.2d 441, 446-47 (N.D. 1974).

41. *See, e.g.*, Gurmankin v. Costanzo, 411 F. Supp. 982, 992 n.8 (E.D. Pa. 1976); New York State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 762 (E.D.N.Y. 1973); *In re* Levy, 38 N.Y.2d 653, 345 N.E.2d 556, 382 N.Y.S.2d 13 (1976).

42. James v. Strange, 407 U.S. 128, 140 (1972); Eisenstadt v. Baird, 405 U.S. 438, 447 (1972); Reed v. Reed 404 U.S. 71, 76 (1971); Rinaldi v. Yeager, 384 U.S. 305, 309 (1966).

tims also are confronted with a formidable task when the challenged act is *facially neutral*, but is applied or enforced in a discriminatory manner. In such situations, the plaintiff must prove that the discriminatory act was purposeful and that there was an intent to discriminate. Although it is not impossible to prove intent, it may prove exceedingly difficult in the majority of cases, even if actual discrimination exists.

Due Process

The fourteenth amendment also requires that neither life, liberty, nor property may be withdrawn or withheld from an individual unless there is an adequate determination that the deprivation is justified.[43] Where a due process violation is claimed, the courts determine whether the plaintiff had a liberty or property interest at stake; whether governmental action infringed such an interest; and whether adequate due process procedures were followed.[44] Even though education is not a fundamental right, it can be a property right.[45] If education is denied without due process, a fourteenth amendment violation may exist.

Rehabilitation Act of 1973 — Section 504

On September 23, 1973, The Rehabilitation Act (P.L. 93-112) was enacted by Congress. Included among its many provisions was section 504, which represents the first federal civil rights law protecting the rights of handicapped persons. The language of the Act is almost identical to the wording in title VI of the Civil Rights Act of 1964 and to the wording in title IX of the Education Amendments of 1972: "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance."[46]

The regulations implementing section 504 took several years to evolve; there were a number of administrative concerns to be addressed in addition to several political roadblocks to be removed.

43. *See* Wolff v. McDonnell, 418 U.S. 539, 557-58 (1974).

44. *See* Board of Curators Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978); Bishop v. Wood, 426 U.S. 341 (1976); Goss v. Lopez, 419 U.S. 565 (1975); Perry v. Sindermann, 408 U.S. 593 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970). *See also* De Santis, *The Disabled Student Athlete: Gaining a Place on the Playing Field*, 5 Comm/Ent L.J. 517, 535-37 (1983) for a related discussion.

45. Goss v. Lopez, 419 U.S. 565, 574 (1975).

46. 29 U.S.C. sec. 794 (1983) (regulations are codified at 34 C.F.R. 104 (1983).

Following the passage of section 504, it was five months before the enforcement responsibility of the Act was assigned to the Office of Civil Rights (OCR), Department of Education (then the Department of Health, Education, and Welfare). However, it was May 1976 before draft regulations were issued and before twenty-two public hearings were conducted.

Although the regulations were finalized soon thereafter, they were not made public for nearly a year. Secretary Mathews was reluctant to have them issued for a number of reasons — primary of which was his concern over the inclusion of alcoholics and drug addicts within the definition of "handicapped." Because of his delay, lobby groups took a number of steps to force the issuance of the regulations, including the filing of a law suit, *Cherry v. Mathews*.[47] Nevertheless, Secretary Mathews left office on January 20, 1977 without taking action. Secretary Califano, Mathews' successor, also was concerned about the political repercussions of the Act, but could continue the delay only three and one-half months. On May 4, 1977, the regulations were issued; the total process lasted three years and eight months.

In spite of the fact that the departmental rules had been formalized and promulgated, victims of handicapped discrimination still were unable to acquire relief, because the OCR already had a substantial backlog of race and sex discrimination complaints. Organizations concerned with those forms of discrimination were able to acquire a court order (*Adams v. Califano*[48]) requiring the processing of existing cases prior to the investigation of new complaints, which included all of those related to handicap. After substantial political pressure, the decree was modified to permit the OCR to expand its investigations.

The Act requires recipients of federal financial assistance (grants, loans, contracts, etc.) to file an assurance of compliance; to take remedial action where violations are proven; to take voluntary action in addition to that required by the Act, to overcome the effects of conditions that resulted historically in limiting participation of handicapped persons in the recipient's program; to conduct a self evaluation; to designate a particular employee to coordinate compliance; to adopt grievance procedures; and to give notice to participants that recipient's program does not discriminate against handicapped persons.

47. 419 F. Supp. 922 (D.D.C. 1976).
48. 430 F. Supp. 180 (D.D.C. 1977).

Under the Act, a person is *handicapped* if he has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment (section 104.3(j)). (Note that the definition does not include environmental, cultural, or economic disadvantages). *Impairments* include, but are not limited to, diseases or conditions such as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, drug addiction, and alcoholism. However, prior to a person being classified as handicapped, it also must be shown that a *major life activity* (caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working) is limited due to the nature and severity of the handicap.

It should be noted that The Rehabilitation Act protects persons who have a record of impairment, and who are regarded as having an impairment, in addition to those who currently are impaired. For a person to have a *record of impairment*, he must have a history of, or be misclassified as, having an impairment (section 104.3(j)(2)(iii)). For a person to be *regarded as having an impairment* he must (1) have an impairment that does not substantially limit a major life activity, but is being treated by a recipient as if it does; (2) have an impairment that substantially limits a major life activity only as a result of the attitudes of others toward the impairment; or (3) be treated by a recipient as having an identified impairment, even though no limiting condition actually exists (section 104.3(j)(2)(iv)).

Once it has been determined that a person is "handicapped" under these provisions, it then must be ascertained whether he is "qualified." To be *qualified*, as that term is applied to preschool, elementary, and secondary school students, a handicapped person must be (1) of an age during which nonhandicapped persons are served, (2) of an age during which handicapped persons must be served under state law, or (3) elgible for a free appropriate public education under the EHA (section 104.3(k)(2)).

In prohibiting discrimination, the Act requires recipients to provide qualified handicapped students with aid, benefits, or services that are equal to those provided nonhandicapped students (i.e., equal in quality of materials, teacher quality, length of school term, daily hours of instruction, etc.). Programs available to the handicapped should not be separate from those available to the nonhandicapped, unless such segregation is necessary for the program to be effective. Where programs are permissibly separate, facilities also must be equal.

In addition to the above, a recipient must identify every qualified handicapped person residing within its jurisdiction who is not receiving a public education, and must inform each of them of their rights under the Act. Also, an appropriate public education must be made available to each qualified handicapped person, regardless of the nature or severity of his handicap. In order to guarantee that an appropriate education is made available, section 504 regulations include requirements for notice, consent, identification, evaluation, and placement. These requirements are similar to those mandated under the EHA and are discussed in chapter 2.

In addition to the rights provided by the fourteenth amendment and section 504, handicapped students also have rights under the EHA, as amended by P.L. 94-142.

Education of the Handicapped Act (EHA)

The content of the EHA, as amended by P.L. 94-142, reflects a long history of state and federal legislation and case law. As noted earlier, most states by 1975 had passed laws requiring local school districts to educate all resident children regardless of the nature or severity of their respective handicaps; also, courts were instrumental in mandating appropriate programs, individualized testing, equal access to nonacademic and extracurricular programs, and the like. Federal legislation addressed several related problems in an effort to provide minimum guarantees for all children regardless which state they resided in, or whether they had filed complaints in courts of law. In spite of these efforts, legislation was incomplete in establishing a vehicle for enforcing the rights of handicapped children, in maintaining appropriate programs, and in providing necessary funding. Accordingly, the time was ripe for the passage of additional, more comprehensive, legislation.

The evolution of the EHA began nineteen years ago with The Elementary and Secondary Education Act (ESEA) of 1965 (P.L. 89-10), which aided educationally deprived children residing in school districts with high concentrations of low-income families. Where handicapped children were educationally deprived because of low income, they too were eligible; however, the ESEA was not originally designed to assist handicapped children, per se. Over the next several years, however, the Act was amended in a number of ways that benefited special need students. The most important of these revisions were The Elementary and Secondary Education Act Amendments of 1966 (P.L. 89-750) and The Education of the Handicapped Act of 1970 (P.L. 91-230). Public Law 89-750 created both the *Bureau*

of Education for the Handicapped and the *National Advisory Committee on Handicapped Children* (eliminated under The Education of the Handicapped Amendments of 1977, P.L. 95-49); also, it provided federal assistance to states to initiate, expand, and improve programs for handicapped children. Public Law 91-230 replaced title VI of the ESEA, increased assistance for programs, and consolidated previous provisions. Furthermore, both the ESEA (as amended) and the EHA were re-authorized by The Education Amendments of 1974 (P.L. 93-380). In addition to substantially increasing federal funding, the Amendments required state assurances that all handicapped children be given special education services, that the state work toward full educational opportunity for its resident handicapped children, that records be confidential, and that procedural safeguards consistent with the statute be established.[49]

The role of the federal government became even more substantial when President Ford reluctantly signed The Education for All Handicapped Children Act (P.L. 94-142) into law on November 29, 1975. This enactment was a complete revision of part B of the EHA. Although sections other than part B remained basically unchanged, the impact of the revisions to that part were so comprehensive that P.L. 94-142 has become known as the Bill of Rights for the education of handicapped children. Furthermore, with this increase in federal funding came a growing number of recipient responsibilities.

The maximum amount of aid to be contributed by the federal government is determined by multiplying 40 percent of the *national average per pupil expenditure* (NAPPE) by the number of handicapped children (ages three through twenty-one) being served (section 1411(a)(1)).[50] The number of handicapped children to be used in the formula is equal to the average of the number of children receiving special education and related services on October 1 and February 1 of the preceding fiscal year (section 1411(a)(3)). The number of children to be used in the calculation may not, however, be greater than 12% of the total number of children ages five to seventeen within the state (section 1411(a)(5)(i)). Funds received under the Act must supplement, not supplant, state and local dollars. Furthermore, 75% of the federal contribution is to "pass through" the state, with the state having no direct control over its use (section 1411(c)(1)(B)).

49. *See* Shrybman, Due Process in Special Education (1982), at 9-28 for a related discussion.

50. Prior to September 30, 1982, the multiplier ranged between 5% in 1978 and 30% in 1981. Unless the formula is amended in coming years, the 40% multiplier will continue to be used in calculating the maximum grant amount to which a state is entitled.

If a state chooses not to receive P.L. 94-142 funds, it is not required to comply with the provisions of the Act. Nevertheless, the state still is responsible for meeting the needs of its handicapped children as stipulated under section 504. Because section 504 requires much of what is required by P.L. 94-142, refusing federal funds substantially reduces the amount of dollars available to a given state, but does not eliminate a comparable number of responsibilities.

When Congress passed P.L. 94-142, it identified several purposes: to ensure that a free appropriate public education (FAPE) is made available in the least restrictive environment to each handicapped child between the ages of three and twenty-one (section 1412(2)(B)) (except where state law, state practice, or court order, restricts the participation of children aged three, four, five, eighteen, nineteen, twenty, or twenty-one); to guarantee that the rights of handicapped children are protected; to financially assist state and local units in providing appropriate programs; and to assess the effectiveness of efforts to provide appropriate programs. Under the EHA, handicapped children not receiving an education are "first priority" children, while those with severe disabilities[51] who are receiving an inadequate education are "second priority" children (section 1414(a)(1)(C)(ii)).

To be defined as *handicapped*, a child must be mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired, or have a specific learning disability, *and*, by reason thereof, require special education and related services (section 1401(1)). Accordingly, a child may possess a handicapping condition, but may not be in need of special education and related services and, therefore, may not be classified as handicapped under the EHA.

In meeting the requirements of the Act, recipients are required to identify, locate, and evaluate all resident handicapped children; to develop an individual education program (IEP) for each handicapped child; to establish procedural safeguards; and to hold in confidence information and data used in evaluation and placement. A FAPE requires special education and related services that (1) are provided at public expense and are under public supervision and direction; (2) meet the standards of the state education agency; (3) include an appropriate preschool, elementary, or secondary education; and (4) conform with a child's IEP (section 1401(18)). The Act

51. When an impairment is of such a nature that the child is in need of special education, his condition is referred to as a "disability."

defines *special education* as "specially designed instruction ... to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions" (section 1401(16)). *Related services* include transportation and such developmental, corrective, and other supportive services that are necessary to assist a handicapped child to benefit from a special education (section 1401(17)). Accordingly, a child would not be eligible for related services, if he were not receiving special education. Early identification and assessment are identified as related services just as are speech pathology, audiology, phychological services, physical and occupational therapy, recreation, and counseling and medical services. However, only those medical services that are required for diagnostic and evaluation purposes are included.

As the above indicates, the regulations for both section 504 and the EHA cover a broad area; futhermore, these requirements have been interpreted by both educators and the courts in a variety of ways. As a result, legal controversies involving handicapped students have become common beginning in the late 1970's. Selected issues are further reviewed in this publication, including the nature of FAPE, access to school records, discipline, minimum competency testing, and physical education and sports participation.

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Free Appropriate Public Education

In providing a free appropriate public education (FAPE) in the least restrictive environment for all resident handicapped children, responsible educational units have confronted a growing number of controversies regarding identification, evaluation, IEP preparation, placement, and procedural safeguards.[52]

Identification

If handicapped children are to be provided with FAPE, they first must be identified. Identification is the responsibility of the service provider and not of the parent. It can be convincingly argued that if parents alone were responsible for referrals, it would be unlikely that all handicapped children residing within the provider's region would be identified. For such a practice to be effective, all parents would have to recognize that their children are not functioning academically; understand that special education could help ameliorate the problem; be knowledgeable of the procedures to acquire the necessary services; and properly comply with the identified procedures. Obviously, because most parents have little knowledge of either handicapping conditions or school practices, it is apparent that many resident handicapped children never would be identified or provided with needed services if parents solely were responsible for referrals.

Generally, for a child to be a resident of a particular service area, and thereby be entitled to an education at public expense, his parents also must live there, unless he is a ward of the court,[53] or unless he is under the supervision of a legal guardian.[54] If the child does not meet this standard residency requirement, the provider, at its discretion, still may admit the child.[55] However, where an admissions officer

52. *See* Manville, *Noncompliance With Special Education Mandates: Jose P. v. Ambach*, 18 Educ. L. Rep. 9 (1984) for a discussion of several of the problems New York City has faced in meeting the requirements of FAPE.

53. William C. v. Board of Educ. of Chicago, 390 N.E.2d 479 (Ill. 1979). *Contra* Rabinowitz v. New Jersey State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982).

54. Martinez v. Bynum, 103 S. Ct. 1838 (1983). For a related discussion, see Thomas, *School District Residence for Educational Purposes: Martinez v. Bynum*, Educators and the Law at 124-27 (Thomas, McCarthy, & Cambron-McCabe, eds. 1983).

55. *In re* Curry, 318 N.W.2d 567 (Mich. Ct. App. 1982).

unknowingly admits a student who is not a resident, the educational unit is not entitled to recover tuition, assuming that the student's basis for application was in good faith and was not fraudulent.[56]

Identification activities vary by educational unit, but generally include census taking, community surveys, public awareness activities (information dissemination regarding special education rights and programs), screening of kindergarten children, and referrals by parents, teachers, doctors, and others. Referrals generally are made to the chairperson of the committee responsible for evaluation and placement of handicapped children, or to the administrator of the building to which the child likely is to be assigned. These identification activities, when used in combination, help assure that all resident handicapped children are identified. Prior to conducting such activities, educators must notify the parents of the events to take place and must explain why such events are important. Parents have the right to object to these activities; however, parental consent is not required.

Evaluation

Once a child who may possess a handicapping condition has been identified, it then is the responsibility of the educational unit to properly evaluate him. Prior to the evaluation the parents must be notified of their procedural rights and must be provided with an explanation of what has and will take place, including a description of each proposed evaluation activity. Such notice must be provided in the parent's native language, or other mode of communication, unless it is clearly not feasible to do so (section 1415(b)(1)(D)).

Educators also must receive parental consent prior to conducting preplacement evaluations. These activities are used to evaluate only selected students, as compared to identification activities where all children within a given school or service area are involved. *Parental consent* indicates that the parents have been fully informed regarding all relevant matters, and have agreed in writing that the specified activities may take place. If, at a later time, the parents feel that the evaluation is unwarranted, they have the right to revoke their initial consent. (Although notice and consent are required for both the preplacement evaluation and the initial placement, only written notice is required for re-evaluation, changes in placement, or other actions proposed or refused by the educational unit.)

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56. Teel v. Hamilton-Wenham Reg. School Dist., 433 N.E.2d 907 (Mass. Ct. App. 1982).

If consent is not provided (or if it is withdrawn), school officials then must decide whether to pursue the matter or simply to assign the child to the regular classroom. Although the latter alternative may be less expensive, less time consuming, and less complicated, it likely would result in an inappropriate placement for the individual child, if the child were indeed handicapped. Furthermore, where a child is in need of a more restrictive environment due to his unique needs or behavior, the decision to place him in the regular classroom could prove disadvantageous both for the misplaced child and for the other children assigned to the class. Also, because the child has not been classified as handicapped, the procedural safeguards required by the EHA need not be followed when altering placement or when disciplining. (See chapter 4.)

If local educators wish to appeal the parent's decision not to provide consent, they first must consult state law to determine if procedures have been established for such situations. If no related policies exist, EHA appeals procedures may be followed (i.e., a request could be filed for an impartial hearing). If it is determined at the hearing that the child must be evaluated, the parents may either appeal that decision to the state education agency (section 1415(b)(2),(c)), or withdraw their child from public schools. If the parents withdraw the child from public schools, they generally must enroll him in a private school or acquire approval for a home instruction program.

After consent is acquired (either through traditional means or following a hearing), the child then must be evaluated (1) to determine if a handicapping condition exists, and if special education is needed; and (2) to obtain information to help design an IEP. The evaluation must include all areas related to the suspected disability with information being obtained from a variety of people and sources. Such information generally includes data on the family, related social and economic circumstances, health and psychological assessments, educational background (including academic and social performance), test scores, parent and teacher interviews, observations of the child within both school and home environments, and the like. All tests and other evaluation materials must be validated and must be administered in the child's native language (or other mode of communication) by trained personnel, while the student's handicap must be considered in the selection and administration of appropriate tests (section 1412(5)(C)). Furthermore, federal regulations (section 300.534(b)) require that handicapped children be re-evaluated at least every three years, or more frequently if conditions warrant or if the parent or teacher make such a request.

Independent Evaluation

If the parents are unsatisfied with the conclusions of the evaluation team, they may obtain an independent evaluation (section 1415(b)(1)(A)). The educational unit will incur all costs of the evaluation unless it requests a hearing and is able to substantiate to the examiner's satisfaction that its assessment practices were appropriate. If the hearing officer concludes that the first evaluation was appropriate, an independent evaluation still may be requested; however, all costs now would be borne by the parents. (Note, however, that if the parents pay for an independent evaluation, the committee preparing the child's IEP must consider its findings.) Furthermore, in situations where the independent evaluation already has been conducted, it is possible that the hearing officer could rule that neither existing evaluation is appropriate and that a third evaluation need be conducted. Such evaluations also are provided at public expense.

IEP Preparation

The IEP is to be prepared by a representative of the educational unit who is qualified to provide (or at least to supervise) the instruction and services, the teacher, the parent or guardian, and, when appropriate, the child (section 1401(19)). If neither parent is available or willing to participate, the educational unit is responsible for appointing a *surrogate parent* (section 1415(b)(1)(B)). The surrogate parent has all of the rights and responsibilities of the actual parent and may view educational records, receive notice, grant consent, appeal decisions, and the like.

According to federal regulations (section 300.343(c)), the committee has thirty days from the time the child is identified as handicapped and in need of special education and related services to conduct an IEP meeting. At such meeting, the *IEP document* is prepared; such document represents a written record of the decisions reached at the meeting. It must include a statement of the child's present level of educational performance; a statement of annual goals, including short-term instructional objectives; a statement of the specific educational services to be provided, and the extent to which the child will be able to participate in the mainstream; the projected date for initiating the program and a projected time for its duration; and appropriate objective criteria, evaluation procedures, and schedules for determining whether the identified objectives are being met. Such a review must be conducted at least on an annual basis (section 1401(19)).

If the parents are not satisfied with any aspect of the proposed IEP, they may contest that portion which they feel is inappropriate. Several related disputes recently have been resolved by federal appeals courts.

Selected Case Law — Related Services

The first Supreme Court case interpreting the EHA was *Board of Educ. of the Hendrick Hudson Cent. School Dist. v. Rowley.*[57] In that six-to-three Supreme Court decision, the plaintiff (Amy Rowley) was deaf, but was an excellent lipreader. In an effort to communicate with her and her deaf parents, local school administrators took a course in sign language interpretation, installed a teletype machine, and provided Amy with an FM hearing aid. The IEP prepared during Amy's first grade year stipulated that she be assigned to a regular first grade class and that she receive (1) tutorial instruction for one hour per day, and (2) assistance from a speech therapist for three hours per week.

The parents were willing to accept each of these provisions, but requested that Amy also have a sign language interpreter assigned to her when she attended academic classes. The district earlier had provided Amy with an interpreter for a two week period while in kindergarten. This service was discontinued based on information provided by the former interpreter and by the placement committee. The professionals working with Amy concluded that she did not need such assistance, and at times actually was distracted by the interpreter's presence.

Following the administrative decision not to provide an interpreter, the parents appealed to an impartial hearing officer. The officer ruled in favor of the district and observed that the plaintiff was achieving educationally, academically, and socially without such aid. On further appeal, the New York State Commissioner of Education affirmed the examiner's decision.

After exhausting administrative remedies, suit was filed in federal district court.[58] That court observed that Amy was remarkably well adjusted, that she interacted and communicated well with her peers, and that she maintained extraordinary rapport with her teachers. However, the lower court observed that although Amy's performance in school was above average, she would have learned even more if she were not handicapped. This disparity between Amy's achievement

57. 458 U.S. 176 (1982).
58. 483 F. Supp. 528 (S.D.N.Y. 1980).

and theoretical potential somehow led the court to conclude that FAPE had not been provided, and that a sign language interpreter was necessary. The Second Circuit Court of Appeals affirmed the decision,[59] and appeal was granted by the Supreme Court.

In its review of the case, the Supreme Court majority reasoned that "if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, . . . the child is receiving a 'free appropriate public education'. . . ."[60] This position assumed that the instruction and services were provided at public expense and were under public supervision; that state educational standards were met; that the education was provided at the appropriate preschool, elementary, or secondary school level; and that the provisions of the child's IEP were complied with.

According to the court, a federal law does not guarantee that such individualized instruction will be sufficient to maximize a child's potential commensurate with the opportunities provided other children,[61] or that handicapped children will learn; however, the IEP should be sufficient to confer *some educational benefit*.[62] Furthermore, in determining whether an education is "appropriate," the Court restated the position that great deference should be given to the judgments of educators, and that courts should not substitute their own notions of sound educational policy for those of the school authorities.[63] Such practice would frustrate the preparation of IEPs, particularly if a court were "to set state decisions at nought."[64]

In supporting this definition for FAPE, the Court rejected the position that the EHA was intended to provide *equal educational opportunity* for handicapped children and stated:

> [f]urnishing handicapped children with only such services as are available to nonhandicapped children would in all probability fall short of the statutory requirement of 'free appropriate public education'; to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go. Thus to speak in terms of 'equal' services in one instance gives less than what is required by the Act and in another instance more. The theme of the Act is 'free appropri-

59. 632 F.2d 945 (2d Cir. 1980).
60. 458 U.S. 176, 189 (1982).
61. *Id.* at 186, referencing position taken by the district court, 483 F. Supp. 528, 534 (S.D.N.Y. 1980).
62. *See also* Fialkowski v. Shapp, 405 F. Supp. 946, 959 (E.D. Pa. 1975).
63. 458 U.S. 176, 206 (1982).
64. *Id.*

> ate public education,' a phrase which is too complex to be captured by the word 'equal' whether one is speaking of opportunities or services.[65]

In conclusion, the Court noted that Amy was (1) being educated in the regular classroom; (2) receiving passing grades; and (3) advancing from grade to grade. Accordingly, it reversed the lower court decision, and ruled that the state had complied with the EHA, and that Amy's IEP was reasonably calculated to enable her to receive some educational benefit.

A second related-service Supreme Court case is *Irving Indep. School Dist. v. Tatro*.[66] In that case, the plaintiff (Amber Tatro) had spina bifida and, as a result, suffered from orthopedic and speech impairments in addition to a neurogenic bladder. Amber was unable to voluntarily urinate and required clean intermittent catheterization (CIC) every three or four hours.

The local school district developed an IEP for Amber which included early childhood development classes and physical and occupational therapy, but did not include CIC. As a result, the parents appealed the district's decision through administrative channels, but were unsuccessful. They also were denied a preliminary injunction at the district court level,[67] where it was reasoned that CIC was not a related service as defined under the EHA, because it did not serve a need arising from the effort to educate.[68] Furthermore, the court proposed that section 504 was not violated, because it does not require that educators provide health care for people wishing to participate in federally funded programs.

The Fifth Circuit Court of Appeals reversed the lower court decision,[69] and held that CIC was a related service in that it was necessary if the child were to attend school and thereby benefit from special education. Accordingly, to deny such service was a violation of the EHA. Furthermore, because denying CIC services functionally excluded the plaintiff from attending public schools, a section 504 violation also was present. The appeals court then remanded the case to the district court.

On remand, the district court noted that because a doctor was not needed to administer CIC, it was not a medical service, and, there-

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65. *Id.* at 198-99.
66. 52 U.S.L.W. 5151 (U.S. June 26, 1984), *rev'd in part*, 703 F.2d 823 (5th Cir. 1983). *See also* Tokarcik v. Forest Hills School Dist., 665 F.2d 433 (3d Cir. 1981).
67. Tatro v. Texas, 481 F. Supp. 1224 (N.D. Tex. 1979).
68. *Id.* at 1227.
69. Tatro v. Texas, 625 F.2d 557 (5th Cir. 1980) (Tatro I).

fore, was not limited to diagnosis and evaluation. Accordingly, the district was ordered to modify Amber's IEP to include CIC, and to pay compensatory damages. Also, because section 504 was violated, attorney's fees were awarded to the plaintiff. The Fifth Circuit affirmed this decision,[70] and appeal was granted by the Supreme Court.

In its analysis, the High Court made several relevant observations and conclusions: a child must be handicapped so as to require special education and, therefore, be eligible for related services; only those services that are necessary to aid a handicapped child to benefit from special education must be made available; CIC is not a medical service that must be provided by a licensed physician; related services include school health services that are provided by a qualified school nurse or other qualified person; and CIC can be a supportive service that is necessary for a child to benefit from special education.

Given these positions, the Court ordered the district to provide Amber with CIC, because, for her, such service was found to be necessary if she were to attend school and to benefit from special education; however, attorney's fees were not required, because section 504 was ruled inapplicable where relief is available under the EHA.

Selected Case Law — Extended School Year

In addition to cases involving related services, federal courts also have had to resolve a number of disputes regarding parental demands for extended school years. Among the myriad related cases, *Battle v. Commonwealth of Penn.*[71] has received the greatest attention. (Furthermore, recent cases have provided consistent rulings.[72])

In *Battle*, the plaintiff class constituted the severely and profoundly impaired (SPI) and the severely emotionally disturbed (SED). By the nature of their respective handicaps, many such children often are unable to generalize skills they have learned in one setting to another, to accept changes in routine or environment, or to effectively deal with frustration. Many SPI and SED children regress more significantly than do other children during summer months when instruction is not available.

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70. Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983) (Tatro II).

71. 629 F.2d 269 (3d Cir. 1980).

72. *See, e.g.*, Yaris v. Special School Dist. of St. Louis Cty., 728 F.2d 1055 (8th Cir. 1984); Georgia Ass'n of Retarded Citizens v. McDaniel, 716 F.2d 1565 (11th Cir. 1983); Crawford v. Pittman, 708 F.2d 1028 (5th Cir. 1983); Phipps v. New Hanover Cty. Bd. of Educ., 551 F. Supp. 732 (D.N.C. 1982); Birmingham & Lamphere School Dist. v. Superintendent of Pub. Instr. for Mich., 328 N.W.2d 59 (Mich. Ct. App. 1982).

In the state of Pennsylvania, summer programs were not available for any students, handicapped and nonhandicapped alike, based on an administrative policy promulgated by the state education agency. Individual student needs never were considered, nor was the probability of individual regression studied. The Third Circuit Court of Appeals found the 180 day instructional limit to be incompatible with the EHA. It reasoned that FAPE for a particular child conceivably could require instruction beyond the 180 day limit. By establishing such a restriction, the state was found in violation of federal law.

Accordingly, selected children may require services beyond the traditional school calender. Where extended year placements are required within an IEP, the provider may not assign the student to a 180 day program.[73]

Placement

Once an IEP has been developed and agreed upon, federal regulations (section 300.342(b)(2)) require that an appropriate placement be made available as soon after the IEP meeting as is possible. The placement committee may not be limited by the availability of existing programs, but rather must shape the placement to fit the child. The placement may be either in the public or private sector, assuming that it is at public expense and is under public supervision and direction, and must represent the least restrictive environment for the individual child. Furthermore, it should be as close to the child's home as is possible.

Private Placement

In providing an appropriate placement, the committee may consider both public and private facilities that are capable of providing the necessary special education and services. If an appropriate public placement is available, most states require that it be selected; however, if no public facility is capable of providing FAPE, or if no public placement is open, the committee then may choose among available private programs. When a private placement is selected by the committee, all costs are borne by the public school system for as long as the child is receiving services or until he becomes twenty-one years of age — unless, of course, he graduates or the IEP is altered following a change of placement hearing.[74] The educational unit still is responsi-

73. Tilton v. Jefferson Cty. Bd. of Educ., 705 F.2d 800, 804 (6th Cir. 1983).
74. Vander Malle v. Ambach, 673 F.2d 49 (2d Cir. 1982).

ble for assuring that the requirements of the IEP are met, and that the student continues to receive FAPE. The local educational agency must monitor the child's program and must ensure that all procedural safeguards remain intact.

If, on the other hand, the placement committee has identified an appropriate public placement, the parents still may place their child in a private program, but will be totally responsible for related costs.[75] This has occurred, at times, when the parents feel that a particular private program is superior to the recommended public placement.[76] The EHA, however, does not require that the "best" program be selected; it requires only that the selected program be appropriate.[77]

Where a child is enrolled in a private school independent of a recipient, the school would be responsible for meeting the EHA requirements only (1) if it receives federal aid, and (2) if it operates an appropriate special program. For example, if a private school does not offer a program for deaf students, it is not required to admit such applicants unless they are able to participate in the program with only minor adjustments. Where qualified students are admitted to nonspecial education programs, education fees may not be greater than those charged nonhandicapped students, unless the additional charge is justified by a substantial increase in cost to the recipient.

Least Restrictive Environment (LRE)

Federal law requires that handicapped children be educated with nonhandicapped children to the maximum extent possible, and that separate programs be provided only when the nature or severity of the handicap is such that education in regular classes, with the use of supplemental aids and services, cannot be achieved satisfactorily (section 1412(5)(B)).[78] Typically, the more restrictive the environment, the more controlled and isolated it becomes. The continuum of alternative placements may include regular classes, regular classes with itinerant teachers, regular classes with resource rooms, special

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75. *E.g.*, Mountain View -- Los Altos Union High School Dist. v. Sharron B.H., 709 F.2d 28 (9th Cir. 1983). However, where a child is withdrawn from his public placement and enrolled in a private program due to long administrative delays, circumstances could dictate that the public educational unit is responsible for the costs. Walker v. Cronin, 438 N.E.2d 582 (Ill. App. Ct. 1982).

76. Hessler v. State Bd. of Educ. of Md., 700 F.2d 134 (4th Cir. 1983).

77. Bales v. Clarke, 523 F. Supp. 1366, 1370 (E.D. Va. 1981); Springdale School Dist. v. Grace, 494 F. Supp. 266, 272 (W.D. Ark. 1980).

78. *See* Department of Educ. of Hawaii v. Katherine D., 727 F.2d 809 (9th Cir. 1983) where a home treatment program did not qualify as an LRE.

classes, special schools, home instruction, and instruction in hospitals and residential institutions.

Although the regular classroom theoretically represents the least restrictive placement, it is not appropriate for all students. Indeed, residential care may be the LRE available for some handicapped children.[79] If a residential placement is required for educational purposes, the district must bear all of the costs for the program, including nonmedical care, room, and board.[80] However, if residential care is necessitated by home conditions (or other noneducational circumstances), the school system is not required to pay for room and board.

If the parents feel that the placement that has been selected is not appropriate, they may appeal that decision through administrative channels and then to the courts.

Procedural Safeguards

Where EHA rights are violated, established state procedures, which are consistent with federal statute, will guide relief efforts. If the parents do not approve of the IEP or of the resulting placement, they have the right to voice that complaint before the responsible committee. If agreement is not reached, many local educational units request that the parents join them in mediation. Although conciliators have no authority to make binding decisions, they often are able to identify common ground and to propose a compromise position which both parties are willing to agree. Mediation is less expensive than is an impartial hearing, it generally takes less time, and it can be less adversarial.

Nevertheless, if mediation is either unsuccessful or unavailable, the parents may request that an *impartial hearing officer* examine the controversy. To ensure that the examiner actually is impartial, the EHA requires that he not be an employee of the involved agency and that he not be affected by any controversy which he is to resolve (section 1415(b)(2)).

At the hearing, the parties may be accompanied and advised by counsel and by persons with special knowledge or training with respect to the child's handicap; may present evidence and confront, cross-examine, and compel the attendance of witnesses; may receive a written or electronic verbatim record of the hearing; and may acquire written findings of facts and decisions (section 1415(d)).

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79. *See* Abrahamson v. Hershman, 701 F.2d 223 (5th Cir. 1983) where the child's needs demanded that he receive "round-the-clock" training and reinforcement in order to make any educational progress.

80. Papacoda v. State of Conn., 528 F. Supp. 68 (D. Conn. 1981).

Federal regulations (section 300.508(a)(3)) also prohibit the introduction of any evidence during the hearing which was not disclosed to the other party at least five days prior to the hearing. When information or evidence is shared, the parties, at times, better understand the other's position and become more willing to cooperate. Even when this does not occur, however, requiring parties to disclose all evidence helps ensure that both are fully informed and have an adequate opportunity to prepare related statements or rebuttals. The local educational unit has forty-five days from the receipt of a request for a hearing to provide a decision, according to federal regulations (section 300.512(a)(1)).

If the parents are unsatisfied with the impartial hearing officer's decision, they may appeal to the state education agency requesting that it review the dispute (assuming that the first hearing was provided by a local or intermediate educational unit and not by the state) (section 1415(c)). The state reviewing official examines the record of the impartial hearing officer and may seek additional evidence at his discretion. He also determines whether adequate due process procedures were followed during the lower administrative hearing. Federal regulations dictate that the state must render its decision within thirty days following the request for review (section 300.512(b)(1)). After this final administrative appeal, the parents then may bring a civil action in federal district court, or appropriate state court, without regard to the amount in controversy (section 1415(e)(4)).

When court action is initiated, the court receives the records of the administrative hearings and determines the weight to be accorded such evidence. It also hears arguments and views additional evidence presented at the request of either party. In rendering its decision, the court must base its decision on the *preponderance of the evidence*, and may grant such relief as it considers appropriate (section 1415(e)(2)), within statutory parameters.

During these appeals (both administrative and judicial), the child must remain in his current educational placement,[81] unless an alternative arrangement is agreed to by the parties (section 1415(e)(3)). In effect, the *stay put provision* of the EHA operates as an automatic preliminary injunction,[82] prohibiting the transfer of a student until appeals are completed. Where possible, this requirement should be regidly adhered to. However, there are times when continued enroll-

81. Cain v. Yukon Pub. Schools, Dist. I-27, 556 F. Supp. 605 (D. Okla. 1983).
82. Zvi D. v. Ambach, 694 F.2d 904, 906 (2d Cir. 1982).

ment in a particular program is not possible (e.g., when a private school closes during the appeal).

Notwithstanding the above, if a student currently is enrolled in a parent-selected private school, he may remain there during the appeal of his initial evaluation;[83] however, the local unit is not responsible for any of the costs. Public educators did not place the child in the facility and, therefore, are not responsible for related expenses. If public expenditure were required in such cases, parents routinely would place their children in private schools and (1) request admission to a public program, then (2) demand state funding during an appeal of the public placement decision. Furthermore, if parents withdraw their child during an appeal and place him in a private program, the educational unit again generally is not responsible for the costs of the new, unapproved placement.[84]

Even where the rights of handicapped children are violated, the courts are limited in granting relief.[85] In a recent Supreme Court decision, *Smith v. Robinson*, a six-to-three majority disallowed the provision of attorney fees to the petitioner and concluded that "Congress intended the EHA to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publically financed special education."[86] Accordingly, where the fourteenth amendment, section 504, or section 1983 are co-extensive with the EHA, relief is limited to that available under the EHA.

Summary

Federal courts require educators to involve parents in the decision-making process,[87] and to explicitly meet the identification, evaluation, IEP document, placement, and due process requirements of the EHA. Each child who is handicapped and, as a result, is in need of special education and related services, must be provided with a

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83. *See* Stacey G. v. Pasadena Indep. School Dist., 695 F.2d 949 (5th Cir. 1983).

84. *See* Rowe v. Henry Cty. School Bd., 718 F.2d 115 (4th Cir. 1983); Miener v. Missouri, 673 F.2d 969 (8th Cir. 1982); Stemple v. Prince George's Cty. Bd. of Educ., 623 F.2d 893 (4th Cir. 1980), *cert. denied*, 450 U.S. 911 (1981); Lillian S. v. Ambach, 461 N.Y.S.2d 501 (N.Y. App. Div. 1983).

85. *See* Timms v. Metropolitan School Dist. of Wabash Cty., 718 F.2d 212 (7th Cir. 1983); Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981); Christopher N. v. McDaniel, 569 F. Supp. 291 (N.D. Ga. 1983).

86. 52 U.S.L.W. 5179 (U.S. June 26, 1984), *aff'd*, 703 F.2d 4 (1st Cir. 1983).

87. Although parents have the right to participate during committee meetings, they are not "support personnel" as defined by the EHA, and may not require the district to provide them with in-service training to help educate them regarding the handicaps of their children. *See* Rettig v. Kent City School Dist., 720 F.2d 463, 465 (6th Cir. 1983).

FAPE which is reasonably calculated to provide him with some educational benefit.

Equal educational opportunity is not mandated, nor are EHA fund recipients required to finance the "best" education possible for resident handicapped children. Furthermore, duly authorized evaluation and placement committees have the responsibility for determining which programs are appropriate. Parents may appeal such decisions through mediation, impartial administrative hearings, and the courts. However, justices generally will not substitute their opinions of what constitutes an appropriate education for the judgments of educators, unless such decisions are proven arbitrary.

3

Student Records

Prior to 1974 it was common for educators to deny to parents the right to review their child's school records. To permit access would be time consuming and costly (i.e., explaining and interpreting records, maintaining files, etc.). Many educators were concerned that access also would increase their accountability by further opening up the education process to public scrutiny. They were concerned that some items contained in the records would be misleading, inaccurate, or even defamatory, and that complaints or court actions would follow. Public awareness was sure to result in more administrative responsibilities to handle, more controversies to resolve, more hearings to provide, more forms to prepare, and more records to maintain.

The fear of these educators came to fruition in 1974 when the United States Congress enacted the Family Educational Rights and Privacy Act (hereafter called Buckley Amendment or FERPA).[88] Congress was aware of the responsibility it was placing on educators, but felt that, on balance, the rights of parents and students (1) to know and understand the content of school records, and (2) to restrict access of third parties to school records were paramount.

The Buckley Amendment applies to all students attending institutions which receive federal financial assistance and not just to students who are handicapped. However, this law has particular importance for the handicapped, because they typically are subject to more evaluations, tests, and observations in the development of their IEPs than are nonhandicapped students, and because they are guaranteed a free appropriate education. Whether an appropriate education is indeed being provided could be substantially supported by school records. Accordingly, parental access to such records is essential if the rights of handicapped children are to be guaranteed. Due to the importance of this right, EHA regulations restated many of the requirements found in FERPA. The more important provisions of that law are discussed below.

88. 20 U.S.C. sec. 1232g.

Access Rights

Under federal law, parents have the right to inspect and review the education records of their children. This right is available not only to parents in legal guardianship, but also to divorced or separated parents — even if the guardian does not want the records made available to an estranged or former spouse[89] — unless such right otherwise has been legally restricted (e.g., a court order). Also, students attending a secondary institution who are eighteen years of age or older and students attending a post secondary institution have access to their own records and are then responsible for providing consent (hereafter called "eligible students") (section 1232g(d)). Federal regulations (section 300.574) qualify this right, however, by noting that prior to transferring the rights of parents to a handicapped student, the student's type and severity of disability may be considered in addition to his age. However, the educational unit is not required to comply with a request if the records being sought belong to a student who is not in attendance nor has ever been in attendance at such agency or institution (section 1232g(a)(6)). For example, a parent or eligible student would not have access to records maintained by institutions to which the student applied, but was not admitted.

In addition to the parents and student, access to school records (other than directory information) generally is permitted only if written consent of the parent (or eligible student) is provided (section 1232g(b)(1)). However, several exceptions to this provision apply: educators with legitimate educational interests; officials representing schools to which the student has applied for admission; persons responsible for determining a student's eligibility for financial aid; organizations conducting certain studies; authorized representatives of the United States Comptroller General, the Secretary of the Department of Education, and certain state and local education authorities; and, in emergency situations, persons who can protect the health and safety of the student or other persons (section 1232g(b)(1)(A,B,C,D,E,F,G,I). Also, written permission is not necessary if the parents of a dependent eligible student request access (section 1232g(b)(1)(H)), or if records have been subpoenaed or otherwise obtained through judicial order.[90] However, prior to ordering the release of information, a court will weigh the need for access against the privacy interests of the plaintiffs. If disclosure is warrant-

89. *See e.g.*, Page v. Rotterdam-Mohonasen Cent. School Dist., 441 N.Y.S.2d 323 (N.Y. Sup. Ct. 1981).

90. Reeg v. Fetzer, 78 F.R.D. 34 (W.D. Okla. 1976); Mattie T. v. Johnston, 74 F.R.D. 498 (N.D. Miss. 1976).

ed, the information may have to have all identifiable data obliterated and be put in a scrambled order to lessen the likelihood that individual data could be identified and, therefore, invade the privacy of those students.[91]

Where written consent is required, the specific records being requested must be identified, the proposed use of the information must be specified, and the methods of acquiring the data must be explained. Also, the parents have the right to request a copy of the material to be released (section 1232g(b)(2)(A)). Furthermore, it is the responsibility of the educational unit to maintain a record of all nonexempt individuals or groups that request or obtain access to a child's records. This record must state the legitimate interests of those given access and must be kept with the student's other records (section 1232g(b)(4)(A)).

The educational unit which maintains student records must comply with a legitimate request for review without unnecessary delays and at least five days prior to any meeting regarding identification, evaluation, IEP, or placement. In no case may the delay be longer than forty-five days (section 1232g(a)(1)(A)). (When an education unit automatically schedules disclosures on the forty-fifth day, as many historically have done, it is in violation of federal law.)

Accessible Records

Not all records maintained by educators qualify as "educational records," as that term is defined under FERPA. Included are those records, files, documents, and other materials which contain information directly related to a student and are maintained by an educational unit or by a person acting for such unit (section 1232g(a)(4)(A)). Not included within this general description are records maintained by (1) educators that are in the sole possession of the maker and are not accessible or revealed to any other person except a substitute; (2) school law enforcement unit officials who do not have access to "educational records," if the records they maintain are used only for law enforcement purposes, are separate from accessible records, and are not available to persons outside the unit; (3) personnel officials regarding student employees, if such data relate exclusively to employment and are not available for any other purpose; and (4) physicians, psychiatrists, psychologists, or other professional persons

91. Kryston v. Board of Educ., East Ramapo Cent. School Dist., 430 N.Y.S.2d 688 (N.Y. App. Div. 1980); Board of Educ., Island Trees Union Free School Dist. v. Butcher, 402 N.Y.S.2d 627 (N.Y. App. Div. 1978).

that are used in the treatment of eligible students and are not available to other persons, except at the request of the student (section 1232g(a)(4)(B)).

Among the materials classified as "educational records" are a number of reports, surveys, studies, summaries, and the like, which include information on more than one student. Parents wishing to view their child's records have access to all individualized data that are not otherwise excluded based on the aforementioned, but may view only that portion of group information that is specific to their child. All other data must be obliterated or withheld (section 1232g(a)(1)(A)).

Yet another form of information maintained by educators is directory information which may include the student's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student (section 1232g(a)(5)(A)). Written consent is not required for the release of directory information.[92]

Prior to making directory information available, the educational unit must give public notice of the categories of information that it has designated as directory and must allow a reasonable period of time for parents to deny release (section 1232g(a)(5)(B)).[93] Notice may be publicized in a public newspaper, a school paper, a student handbook, a note to parents to be carried by their children, or other method (or combination of methods) to guarantee circulation adequate to notify involved parents.[94] Also, such notice must be provided by the educational unit rather than by the party seeking the information.[95]

Amending Records

If the parents (or eligible student) disagree with the content of any school record, they may request that school officials withdraw the material. If officials refuse to comply with the request, the parents are entitled to a hearing at which time a hearing officer will determine whether the challenged material is accurate and appropriate. Such a procedure helps ensure the accuracy of records and provides

92. Kestenbaum v. Michigan State Univ., 294 N.W.2d 228 (Mich. Ct. App. 1980), *aff'd*, 327 N.W.2d 783 (1982).
93. *See* Sauerhof v. City of New York, 438 N.Y.S.2d 982 (N.Y. Sup. Ct. 1981).
94. *See* Rios v. Read, 73 F.R.D. 589 (E.D.N.Y. 1977).
95. Mattie T. v. Johnston, 74 F.R.D. 498 (N.D. Miss. 1976).

an opportunity for correction or deletion. At the hearing, if the material is ruled to be accurate, it need not be removed or otherwise amended; however, the parents may prepare a statement to be placed with the information stating their objection (section 1232g(a)(2)). Following this exercise, the original document, along with the parents' statement, must be made available when access is permitted.

If, at a later time, school officials decide to "clean up" certain records, the parents' statement may not be removed unless the accompanied document also is withdrawn. Such a "clean up" exercise, however, may not take place if there are any outstanding requests to review the file.

Policy Requirements

School boards must adopt a written policy consistent with FERPA. The policy must include procedures for providing annual notice, for permitting parental access, and for challenging the content of records. Definitions of "school officials," "legitimate educational interest," and "directory information" must be stated. Also, a list of the types and locations of information must be maintained, the person within the district responsible for compliance with FERPA must be identified, and the fee (if any) to be charged for making copies must be specified. However, the agency or institution may not charge a fee to search for or to retrieve information; nor, according to the EHA regulations, may it charge a fee for copies if such payment effectively prevents the parents from exercising their rights to inspect and review those records.

Noncompliance

Where parents are denied the right to inspect and review the records of their children, the administrative head of the unit is authorized to enforce the provisions of the Buckley Amendment. If a recipient of federal financial assistance refuses to comply, an action by the Secretary of Education could be taken to terminate aid if it was determined that compliance could not be secured by voluntary means (section 1232g(F)). However, no private right of action exists under FERPA.[96] (See chapter 2 for a discussion of EHA procedural safeguards.)

96. Girardier v. Webster College, 563 F.2d 1267 (8th Cir. 1977).

4

Discipline

School officials are responsible for maintaining an environment for students that is both safe and conducive to learning. In fulfilling this responsibility, it is necessary to establish, promulgate, and uniformly enforce reasonable rules and regulations. Such rules are assumed to be established in good faith and to be necessary to meet the objectives of the school. Furthermore, the right of educators to regulate student behavior is similar to that held by parents when dealing with their own children. As a matter of degree, teachers act *in loco parentis* (in place of the parent), but do not have absolute control of students. Students are "persons" under the Constitution and "do not shed their rights at the school house door":[97] accordingly, students have equal protection and due process rights, among others.

Nevertheless, where students violate school rules, it may be necessary to discipline them. School officials often employ suspension, expulsion, transfer, in-school suspension, and withdrawal from extracurricular programs in dealing with violators. The administration of these forms of discipline is governed by either federal or state statute, agency guidelines, board policy, or case law. Because the number of involved groups, related guidelines, and cases has increased substantially since 1973, controversies regarding the discipline of handicapped students have become complex.

Suspension[98]

Guidelines for suspension of students were outlined in *Goss v. Lopez*, a 1975 Supreme Court case.[99] In that case, the Court stated that the right to a public education is a protected property interest that may not be withdrawn without minimum due process of the law. According to the Court, brief suspensions (up to ten days) do not require a formal hearing, but do require an informal conference to

97. Tinker v. Des Moines School Dist., 393 U.S. 503, 506 (1969).

98. The sections on suspension and expulsion in this chapter are loosely based on an article prepared by Thomas and Walter to be published in the *Educational Forum*.

99. 419 U.S. 565, 581 (1975).

guard against the possibility of unfair, mistaken, or arbitrary decisions. During this conference, the student must be informed of the basis for the allegations and be allowed the right to rebut the evidence. The student may be suspended immediately, without an informal hearing, only when he is a danger to himself or to others, or when he causes a substantial disruption of the school environment. However, even where such circumstances exist, the student must be provided an informal hearing as soon after his removal as is possible.[100]

Since 1975, numerous other courts also have required informal hearings prior to student suspension; however, only a few of these cases have involved handicapped children. One case evolved after a school administrator suspended an eleventh grade learning disabled child for five days for "intolerable verbal abuse" of a teacher; the administrator's action was upheld by a federal district court in *Board of Educ. of Peoria v. Illinois State Bd. of Educ.*[101] Although *Goss* procedures were followed, the child's parents argued that a five-day suspension was tantamount to expulsion. They contended that the school system had not provided a formal hearing and had not demonstrated (1) that the child's misconduct was not related to his handicap, and (2) that the child was appropriately placed at the time of his misbehavior. The court rejected this argument, noting that suspension and expulsion are fundamentally different disciplinary actions. Because the suspension did not exceed the ten-day limit in *Goss*, and because the cessation of services was temporary, only minimum due process procedures were required. The court argued that

> [t]here is absolutely no social or other value in assuming that the 'child's' outburst [was] . . . the fault of someone other than the offending student . . . [and that] any theory that some harm of the brief interruption of classroom work outweigh the educational value of the suspension here can only be recognized as pure imagination, or a feeble attempt at rationalization of a preconceived notion that handicapped students, whatever the degree of handicap, are free of classroom discipline.[102]

In addition to the more traditional type of suspension examined in *Peoria*, there exist indefinite, successive, and conditional suspensions which present additional problems (e.g., where education is withheld

100. *See, e.g.*, Mattie v. Holladay, No. DC-75-31-5, 3 EHLR 551:109 (N.D. Miss. 1979).

101. 531 F. Supp. 148 (C.D. Ill. 1982).

102. *Id.* at 150.

because a program must be prepared consistent with a child's IEP; where multiple hearings are conducted to sustain additional suspensions; or where a child is not permitted to return to school until his behavior has changed or until he is accompanied by his parents). A case in point is *Sherry v. New York State Educ. Dept.*, where a federal district court was asked to rule on the legality of an indefinite suspension of a multiple handicapped student from a state school for the blind.[103] The school suspended the child following an incident of self-abusive behavior resulting in injuries requiring hospitalization. The administration attempted to justify its actions by claiming that it did not have the personnel necessary for adequate supervision. Unconvinced by these arguments, the court ruled that during the student's hospitalization, and for a short time thereafter, the placement had not been changed. However, when the suspension became one of an indefinite period, the placement was changed and, therefore, the child should have been provided a hearing consistent with EHA guidelines. (The court did not specify what constituted a permissibly short time for the suspension.) A hearing to appeal the suspension had been offered to the plaintiff, but section 1415 procedural safeguards were not substantially complied with because the hearing officer was not impartial (i.e., the officer was an employee of the educational agency providing the services). The court reasoned that the failure to make an impartial hearing available can not be justified by claiming that procedures otherwise were in substantial compliance with federal regulations.

The issue of successive suspensions was addressed in *Mrs. A.J. v. Special School Dist. No. 1*.[104] In that case, an eighth grade student had been suspended for fifteen days following a fight with another student. She had been given an informal hearing prior to the first of her three consecutive five-day suspensions. During the suspension, she was evaluated to determine whether she was handicapped, but, because a responsible placement committee had not as yet determined if a handicapping condition existed, the court ruled that the district was not required to follow EHA procedures.

However, the student still prevailed under state law. Although Minnesota statutes permitted three consecutive five-day suspensions, an informal hearing was required prior to each suspension. Because the school provided only one informal hearing prior to the first suspension, the entire suspension was held to be impermissible and all reference to it in the school records was to be expunged.

103. 479 F. Supp. 1328 (W.D.N.Y. 1979).
104. 478 F. Supp. 418 (D. Minn. 1979).

Although this case did not technically involve a handicapped student, it still identified an important issue: could a handicapped student be suspended for fifteen days if a *Goss* hearing were conducted? Given the handicapped student's statutory right to an appropriate program, it is not recommended that suspensions be longer than ten days.[105] Where a student is withdrawn from his IEP for longer periods, even if alternative education is made available, most courts would view such an action as an expulsion. Because expulsion is a change of placement, an appropriate hearing would be required.

In a final related case, *Adams Central School Dist. No. 090, Adams Cty. v. Deist*, a handicapped student who was exhibiting increasingly destructive and disruptive behavior was sent home with a note stating that he should not return to school until his behavior had altered.[106] No EHA or *Goss* hearing was provided, while all instruction ceased for approximately one and one-half months. Presumably, when the conditional suspension lasted longer than ten days, it became an expulsion. Accordingly, the child was ruled to have had his placement changed without due process and to have been denied FAPE. The court upheld that part of the decision of the hearing officer that required the district to (1) reimburse the parents for expenses incurred in a private placement, and (2) provide a residential, group-home type of educational setting. However, the court did not uphold that part of the decision that granted FAPE to the plaintiff beyond his twenty-first birthday.[107]

Although legal disputes involving the suspension of handicapped students are by no means settled, the courts have identified a number of areas where there is at least some agreement. Included among these areas are that a temporary suspension is not a change of placement;[108] that procedures that exceed those required in *Goss* are not necessary for suspension hearings;[109] that dangerous or disruptive students may be temporarily suspended prior to a formal expulsion hearing or prior to placement in a more restrictive environment;[110] that a disciplinarian, and not the placement committee, may deter-

105. *See* P-1 v. Shedd, No. 78-58, 3 EHLR 551:164 (D. Conn. 1979).

106. 334 N.W.2d 775 (Neb. 1983).

107. *Id.* at 786.

108. Sherry v. New York State Educ. Dept., 479 F. Supp. 1328, 1337 (W.D.N.Y. 1979); Stuart v. Nappi, 443 F. Supp. 1235, 1242 (D. Conn. 1978).

109. Board of Educ. of Peoria v. Illinois State Bd. of Educ., 531 F. Supp. 148, 150 (C.D. Ill. 1982); Stuart v. Nappi, 443 F. Supp. 1235, 1242 (D. Conn. 1978).

110. Doe v. Koger, 480 F. Supp. 225, 229 (N.D. Ind. 1979); Sherry v. New York State Educ. Dept., 479 F. Supp. 1328, 1337 (W.D.N.Y. 1979); Stuart v. Nappi, 443 F. Supp. 1235, 1242 (D. Conn. 1978).

mine whether suspension is warranted;[111] that the disciplinarian, in emergency situations, need not determine whether the inappropriate behavior was handicap related; and that indefinite or lengthy suspensions (longer than ten days) are not permitted unless procedures that exceed the *Goss* requirements are followed.[112] Yet unanswered are whether educational services, consistent with the IEP, must be provided during a suspension, and whether other courts will agree with the *Peoria* decision that the regular procedures of a district (typically based on *Goss)* are sufficient in suspension hearings concerning relatively minor, nonemergency infractions.

Expulsion

Numerous recent court decisions on the discipline of handicapped students have dealt with the issues of whether, under what conditions, and following what procedures handicapped children can be expelled, given the federal mandates governing their education. The issue of expulsion is even more complex than the issue of suspension. The superintendent or board seeking to expel a nonhandicapped student primarily would be concerned with whether the child is guilty of a school infraction and whether expulsion is in "proportion to the gravity of the offense." Although expulsion procedures are more demanding than are those for suspension (e.g., a formal hearing[113] is required), state or local guidelines generally are explicit and are not challenged successfully unless (1) there was an arbitrary use of authority, (2) the student did not receive an opportunity to provide a defense, or (3) procedures were not followed.

In dealing with a handicapped child, the school administrator is guided not only by state and local practices, but also by federal laws and regulations — provisions that only implicitly deal with expulsion. In general, court interpretations of these guidelines indicate that a handicapped student may not be expelled, or otherwise have his placement changed, until it is determined (1) whether he was appropriately placed at the time of the misbehavior, and (2) whether the misbehavior was a manifestation of his handicap. These determi-

111. Board of Educ. of Peoria v. Illinois State Bd. of Educ., 531 F. Supp. 148, 150 (C.D. Ill. 1982); Stuart v. Nappi, 443 F. Supp. 1235, 1242 (D. Conn. 1978).

112. S-1 v. Turlington, 635 F.2d 342, 348 (5th Cir. 1981); Doe v. Koger, 480 F. Supp. 225, 229 (N.D. Ind. 1979); Stuart v. Nappi, 443 F. Supp. 1235, 1243 (D. Conn. 1978).

113. Generally, a formal hearing includes a written notice reasonably in advance of the hearing; specificity of charges with proceedings confined to those charges; advance notice of evidence; impartial decision maker; right to counsel; presentation of a defense and cross examination; individual trial; sufficiency of the evidence.

nations must be made by persons who are qualified to evaluate and place the handicapped child, and not by disciplinarians.

Stuart v. Nappi was among the first handicapped-student expulsion cases considered by the federal courts. In that case, a child diagnosed as having a learning disability challenged the legality of school disciplinary proceedings which could have resulted in her expulsion for taking part in several school disturbances.[114] She sought a *preliminary injunction* enjoining the board from expelling her. To acquire such relief, plaintiff was required to prove either (1) probable success on the merits of her claim and possible irreparable injury, or (2) sufficiently serious questions going to the merits of her claim and a balance of hardship tipping decidedly in her favor.

The court ruled for the student, and reasoned that if she had been expelled, she would have been denied (1) a free appropriate public education, (2) the right to remain in her current placement until it was determined if there existed a more appropriate placement, (3) an education in the least restrictive environment, and (4) procedural rights regarding changes of placement. The district court concluded that children may not be expelled; they may only be placed in a more restrictive environment. (However, that part of the conclusion that stated that handicapped students may not be expelled is contrary to two more recent circuit court decisions.[115])

The *Stuart* court also ruled that handicapped children are not immune from the disciplinary process and that they may be denied the right to participate in programs when their behavior impairs the education of other children. School authorities may take swift disciplinary measures, such as suspension, against a disruptive handicapped child, and can request a change in placement where it has been demonstrated that the present placement is inappropriate.

In another case, *Howard S. v. Friendswood Indep. School Dist.*,[116] a child with minimal brain damage, a learning disability, and an emotional disturbance was officially dropped from his public school placement without a hearing following a suicide attempt. His special needs had been treated as a discipline problem, and his dismissal proceeding followed the procedures typically employed when students move from the district. Furthermore, the hearing was chaired by the counsel of the district, while the school superintendent made the final decision. There was no formal introduction of evidence; no formal presentation of arguments; no notice of the issues; no impar-

114. 443 F. Supp. 1235 (D. Conn. 1978).

115. *See* S-1 v. Turlington, 635 F.2d 342 (5th Cir. 1981); Kaelin v. Grubbs, 682 F.2d 595 (6th Cir. 1982).

116. 454 F. Supp. 634 (S.D. Tex. 1978).

tial hearing officer; no findings of fact or conclusions of law; and no placement or evaluation committee reports. Although the EHA was not in effect at the time of the controversy, the district still was required to comply with similar procedural safeguards identified in The Rehabilitation Act of 1973. Given the procedural deficiencies of the hearing, the plaintiff was able to support his request for a preliminary injunction forbidding the expulsion. The district also was required to conduct a hearing to determine an appropriate placement for the plaintiff and to pay for the private schooling he received following his improper expulsion.

In *Doe v. Koger*, a mildly mentally handicapped student was suspended for more than ten days for disciplinary reasons and later was expelled for the remainder of the year.[117] The court reasoned that substantive rights provided by the EHA had been violated, but saw no invidious discrimination sufficient to justify a constitutional violation.[118] After a review of the case, the court ruled that although the EHA does not prohibit all expulsions, it does forbid those where a student's conduct is a manifestation of his handicap or where the student is inappropriately placed. Because these factors had not been considered, the expulsion was ruled to have violated federal law. The court noted that the school would be permitted only to transfer the student to an appropriate, more restrictive, environment. (It also is interesting that although the plaintiff in this case was able to file a federal suit prior to completing futile administrative appeals, he was not permitted to file a class action for all current and future students in need of special education because (1) threatened violations of the Constitution and federal law are not within the jurisdiction of the court, and (2) the number of plaintiffs was not so great as to make it impractical to require joinder, thereby failing to satisfy the *numerosity requirement*.[119])

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117. 480 F. Supp. 225 (N.D. Ind. 1979).

118. In evaluating the constitutional issues, the court made it clear that "[t]o subject the handicapped to the same disciplinary expulsions as other students is not to invidiously discriminate against the handicapped . . . . It is quite rational for a school to reserve the option of expelling any student who is interfering with the education of other students. At least with regard to the handicapped, whatever dangers of invidious discrimination are presented by a policy of disciplinary expulsions, those dangers are outweighted by the rationality of disciplinary expulsions." *Id.* at 230.

119. The exhaustion of administrative remedies also was discussed in *H.R. v. Hornbeck*, 524 F. Supp. 215 (D. Md. 1981), where thirteen handicapped children were excluded from educational services under school disciplinary procedures used for nonhandicapped children. The district court stated that section 1415 grants federal district courts jurisdiction only over actions brought by a party aggrieved by a final administrative decision. Although exceptions to this position have been provided where appeals would be futile, plaintiffs in this case did not advance a futility argument. Accordingly, plaintiff's complaint was dismissed for failure to exhaust administrative remedies.

The first federal circuit court to rule on the expulsion of handicapped children was the Fifth Circuit in *S-1 v. Turlington.*[120] Several mentally retarded students had been expelled for being involved in a number of disturbances (e.g., masturbation, sexual acts against fellow students, defiance of authority, vandalism, the use of profane language). The decision to expel was made by the school board and *Goss* procedures were followed, but a hearing consistent with federal statute was not provided. The board members reasoned that expulsion was appropriate because the plaintiffs did not have behavioral handicaps and because they "knew right from wrong." In rendering its decision, the court made the following observations: (1) establishing whether a student knows right and wrong is different from determining if his behavior is a manifestation of his handicap; (2) expelling a student is a change of placement and, therefore, requires a hearing consistent with EHA procedures; (3) expelling disruptive handicapped students still is a proper disciplinary tool under both the EHA and section 504 when proper procedures are followed, but there cannot be a complete cessation of services; (4) determining whether a misbehavior is related to a student's handicap typically is not within the expertise of board members — that responsibility should be given to a specially trained and knowledgeable group of persons; and (5) determining whether a misbehavior is handicap-related should be made on an individual basis without regard to generalizations about handicapped groups.

A similar case, *Kaelin v. Grubbs,* was decided by the Sixth Circuit where a handicapped student had destroyed property, assaulted a teacher, and refused to complete work.[121] As in the cases previously discussed, the student was expelled without determining whether the disruptive behavior was handicap-related, or whether the child, at the time of the disruption, was receiving an education within an appropriate placement. The defendant argued that a double standard of discipline (one standard for nonhandicapped students and a less rigid one for handicapped students) would encourage handicapped children to commit disruptive acts with impunity. The appeals court did not accept this rationale and argued that handicapped children are not free from discipline; they simply have procedural rights that may not be violated.

The court reasoned that although disruptive handicapped students may be suspended following a *Goss* hearing, they must be provided

120. 635 F.2d 342 (5th Cir. 1981).
121. 682 F.2d 595 (6th Cir. 1982).

with the procedural protection of section 1415 prior to expulsion, because the latter is a change of placement. The court proponed that by permitting temporary suspensions for emergency situations, but requiring formal EHA hearings for expulsions, "school officials still retain the authority to control violent or anti-social behavior of handicapped students." The court also noted that the concept of the IEP would be "eviscerated if school officials could expel handicapped children using traditional expulsion procedures."[122] However, even where an expulsion is justified (i.e., the child was working within an appropriate placement at the time of the disruption, and the disruption was not a manifestation of the handicap) and the necessary procedures are followed, there may not be a complete cessation of educational services.

In review of the aforediscussed cases,[123] several positions have emanated: an expulsion is a change of placement and must be administered according to section 1415 procedures; expulsion is theoretically possible under federal statute, but a district must prove that the disruptive behavior was not a manifestation of the child's handicap, and that the child was appropriately placed at the time of the disruption; determinations of appropriate placement and handicap relatedness of the misbehavior must be made by qualified persons and not by disciplinarians; and services may not totally be withdrawn during a legitimate expulsion.

Neither the legislature nor the courts have made it clear as to what level of services is necessary during an expulsion, but it appears reasonable to argue that some services consistent with a child's IEP are required. Furthermore, although a handicapped child theoretically may be expelled, such an occurrence is unlikely in practice. The "appropriate placement" requirement generally is met, because existing IEPs and records usually support current placements;[124] however, it often is difficult to substantiate a claim that the disruptive behavior was in no way related to the handicap.[125] Therefore, although actual expulsion is legally possible, current practice indicates

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122. *Id.* at 602.

123. *See also* Blue v. New Haven Bd. of Educ., No. 81-41 (D. Conn. Mar. 23, 1981); Doe v. Mahre, No. 80-4270-MHP (N.D. Cal. Dec. 12, 1980); and, Southeast Warren Commun. School Dist. v. Department of Pub. Instr., 285 N.W.2d 173 (Iowa 1979).

124. *Contra* Davis v. Wynne, No. CV-176-44 (S.D. Ga., consent decree entered May 21, 1977) (disruptive child's behavior was due to an inappropriate placement).

125. *Contra* Stanley v. School Admin. Unit, No. 40, No. 80-9-D (D.N.H. 1980). The court refused to enjoin the suspension of a learning disabled child where evidence showed that his disruptive behavior was not handicapped related. *But see* Donnie R. v. Wood, No. 77-1360 (D.S.D. Aug. 22, 1977) (the behavior was due to the child's handicap).

that most children are placed in a more restrictive, or simply different, environment rather than be expelled.

Also, when an expulsion is not justified because a student's conduct is found to be related to the handicap, the school system still is faced with the necessity of dealing with, or reacting to, the infraction. Alternatives to expulsion include, but are not limited to, the following: reviewing the child's IEP in order to add goals or procedures designed to deal with the misconduct; providing the student with additional related services; providing assistance to the child's teacher or family for managing or changing the child's behavior; providing additional supervision for the child when in school; and transferring the child to a substantially similar program within the district.

Transfer

Instead of withdrawing a student from school, either through suspension or expulsion, school officials often prefer to transfer the disruptive child to another class or to another school. Such disciplinary transfers are used where it has been determined that the proposed environment would more likely encourage acceptable behavior. Because many transfer decisions are made by disciplinarians rather than by placement committees, and because the environments to which children are transferred are, at times, more restrictive than original placements, legal questions arise.

It is clear that even nondisruptive handicapped students may be transferred when existing placements are found to be educationally deficient, or when programs are terminated or consolidated.[126] Assuming that the child's IEP has not been changed, and that educational services will continue to be delivered in an environment that is no more or less restrictive, no hearing usually is required. Such administrative transfers affect groups of students and generally are within the scope of authority of local boards.

However, if a transfer is behavior related and is proposed by a disciplinarian in order to place a child in a more restrictive environment, a change of placement hearing is necessary. A transfer may indeed be the most appropriate response to a particular child's dis-

126. *See, e.g.*, Concerned Parents and Citizens v. New York City Bd. of Educ., 629 F.2d 751 (2d Cir. 1980); Dima v. Macchiarola, 513 F. Supp. 565 (E.D.N.Y. 1981); Gebhardt v. Ambach, 82 Civ. 244 E (W.D.N.Y. 1982); Windward School v. New York, 3 EHLR 551:221 (S.D.N.Y. 1978); Cohen v. Board of Educ. of New York, 454 N.Y.S.2d 630 (N.Y. Sup. Ct. 1982); Johnston v. Ann Arbor Pub. School, 569 F. Supp. 1502 (D.C. Mich. 1983); Brown v. District of Columbia Bd. of Educ., 3 EHLR 551:101-104 (D.D.C. 1978).

ruptive action; nevertheless, that decision is best made by persons who are knowledgeable of the child's situation and condition (i.e., his placement committee). Where it is proven that the IEP of the child to be transferred would be altered, an injunction conceivably could be issued to prevent the move.[127]

In-school Suspension

In-school suspension occurs when a student is removed from his current class (or classes) and is placed in an isolated (or more isolated) environment. The student is not permitted to leave school during school hours or to remain at home. During the sanction, he still would receive instruction and be assigned work. However, such one-on-one interaction may not necessarily represent better instruction; in practice, students are kept busy and are closely supervised, but seldom do educators have the personnel, resources, or desire to use the suspension period for identifying and meeting individual needs.

When in-school suspensions are used to discipline nonhandicapped students, no constitutional or statutory infraction is likely, because no property or liberty right has been denied. The student still has access to a public education, but, because of his inappropriate behavior, has been removed from the mainstream and has had his mobility restricted. Acts of school officials that are not arbitrary, malicious, or capricious, and that are performed in good faith and in the best interest of the school, are unlikely to be disallowed.

Notwithstanding the general authority of school officials to make student assignments and, as a matter of degree, to restrict student behavior, educators still are limited in their use of in-school suspensions when handicapped students are involved. Although the rationale in *Peoria*[128] may implicitly support the equal use of in-school suspensions in disciplining either handicapped or nonhandicapped students, it is likely that federal appeals courts would view such a reassignment as a change of placement if it were to last longer than ten days.

To use in-school suspension as a routine punishment in disciplining handicapped students for nonemergency, minor infractions appears incompatible with the intent of federal statute, particularly if the reassignment were to exceed the *Goss* limit. Disciplinarians often do not determine the handicap relatedness of inappropriate

127. Cohen v. Board of Educ. of New York, 454 N.Y.S.2d 630, 631 (N.Y. Sup. Ct. 1982).

128. 531 F. Supp. 148 (C.D. Ill. 1982).

acts nor do they often inquire as to whether the student was appropriately placed at the time of the disruption. As a result, a handicapped student conceivably could be routinely removed from his IEP for behavior that is a manifestation of his handicap and is the focus of his program. Such a procedure is not consistent with the mandate that handicapped children be provided FAPE in the least restrictive environment and, therefore, is not recommended unless the student actually has been disruptive or unless he represents a danger.

Where an in-school suspension is warranted, it is recommended that it last no longer than ten days — the maximum permitted for an out-of-school suspension. Excessive use of this disciplinary alternative would represent a change of placement and would require an appropriate hearing.

Withdrawal from Extracurricular Activities

In addition to the basic curriculum offered by a school, there also exist opportunities for students to participate on teams or in clubs, groups, activities, or trips. Such opportunities are not part of the regular program, yet often are financed, coordinated, and supervised by school personnel. Students do not recieve grades for being involved nor are they required to participate. Also, handicapped students cannot be denied the opportunity to participate in such events if they are qualified in spite of their respective handicaps.[129]

Although courts are not in agreement as to whether involvement in extracurricular activities is a protected property right,[130] educators can protect themselves, nonetheless, if they provide an informal *Goss* hearing prior to excluding any student. By taking such a limited precaution, administrators would be able to show that a legitimate effort was made to provide a fair determination of guilt or innocence and that all facts were considered prior to administering an appropriate punishment.

Assuming that standard disciplinary procedures are used for handicapped and nonhandicapped students alike, and that the handicapped are not disciminatorily treated, it is unlikely that a constitutional or section 504 complaint could be substantiated. Furthermore, the EHA also would permit the withdrawal of disruptive handicapped students from extracurricular programs, assuming that

129. Southeastern Commun. College v. Davis, 442 U.S. 397, 406 (1979).

130. *See* Albach v. Odle, 531 F.2d 983 (10th Cir. 1976); Pegram v. Nelson, 469 F. Supp. 1134 (M.D.N.C. 1979); Davis v. Meek, 344 F. Supp. 298 (N.D. Ohio 1972); Moran v. School Dist. No. 7, 350 F. Supp. 1180 (D. Mont. 1972); Kelley v. Metropolitan Cty. Bd. of Educ., 293 F. Supp. 485 (M.D. Tenn. 1968).

such experiences had not been incorporated into their respective IEPs. Where an IEP is altered, however, a placement hearing is required.

Summary

As the aforediscussed indicates, handicapped students, like other students, may be disciplined by school officials. They may be suspended, expelled, transferred, isolated within the school, or withdrawn from extracurricular programs. When and how such punishments may be administered was the focus of this chapter.

5

Minimum Competency Testing

Over the past fifteen years, public education has been the target of numerous attacks. Many parents are concerned that their children performed poorly on standardized tests, that graduates often have inadequate writing and speaking skills, and that the curriculum is inundated with frills at the expense of the basics. Business, industry, and even the military often require new personnel or recruits to engage in special training because the prior education of such applicants was insufficient. One of the many legislative and administrative responses to this situation was the development and use of minimum competency tests (MCTs).[131]

Supporters of the use of MCTs purport that the tests restore meaning to a high school diploma (rather than having graduation determined by a mere measure of seat time); establish explicit standards needed to combat social promotion; help in diagnosing

131. Most of America's fifty states have some form of policy related to the administration and use of minimum competency tests. A variety of grade levels are assessed, beginning as early as the first grade in North Carolina and South Carolina. Reading and mathematics are the two areas most often tested, while writing, consumer economics, language arts, spelling, social studies, science, career development, government, speech, and communications are common. Vermont and Oregon require competency in reasoning; Michigan, Utah, Vermont, and Oregon in listening; and Oklahoma in survival skills. Test results are used primarily for remediation in Arkansas, Michigan, Missouri, South Carolina, Texas, and Wyoming. The use of minimum competency tests as a condition for graduation or promotion has been approved by the state board or legislature in Alabama, Arizona, California, Delaware, Florida, Louisiana, Maryland, Nevada, New Jersey, New Mexico (proficiency endorsement), New York, North Carolina, Oregon, Tennessee, Utah, and Vermont. Local districts may use tests for a graduation requirement in Colorado, Idaho, and New Hampshire, while Indiana provides that the tests should be used for remediation and "other purposes" at the discretion of the local board. However, the use of test results as a condition for graduation or promotion was specifically denied in Kentucky, Massachusetts, Nebraska, Rhode Island, and Wyoming. A high school equivalency diploma may be earned by passing a competency-type test in Connecticut, while Illinois requires that multiple criteria be used to base a decision to modify a program or to deny a diploma. In Maine, the tests were administered only one time, while results in Kansas and Oklahoma are for comparative purposes only. No final action concerning test use has been taken in Georgia or Wisconsin. *See* Pipho, *State Activity: Minimal Competency Testing* (1981).

student weaknesses and in prescribing learning experiences; ensure that students attain minimum proficiency; provide an incentive to learn; give the public a standard to assess the efficacy of schools; and improve the image of public education. Its critics, on the other hand, are concerned about the unsound psychometric practice of basing a decision on a single variable; the use of test items that are not adequately covered in the curriculum; the subjective nature of establishing minimum scores; the likelihood that teachers will tend to teach the content of the test and thereby narrow the curriculum; the excessive cost of test development, administration, and grading; the practice of identifying the student as the person solely responsible for academic deficiencies; and the disproportionate impact MCT based diploma sanctions have on minority and handicapped students.[132]

Several of the arguments for and against MCTs encourage debate; however, this chapter is confined to legal issues that affect handicapped students. Handicapped children represent the group which is most severely impacted if test results are used as one of the criteria for diploma receipt, because as a group they fail the examination in disproportionate numbers.

In those states where MCTs are used as one of the criteria for graduation or promotion, rather than for diagnostic purposes, legal disputes are likely. In examining related cases, the courts have been responsible for determining (1) if the state or school district has the authority to use MCTs to deny a diploma; (2) if test reliability and validity are legally required; (3) if impermissible discrimination results from the use of test scores; and (4) if adequate notice has been given students to prepare for the tests.[133]

State Authority[134]

It has long been acknowledged that the state has plenary (total or complete) power over public education. It has a legitimate interest in improving public schools and in ensuring the value and credibility of its high school diploma. The state may establish educational policy

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132. Schreiber, *High School Exit Tests and the Constitution*, 41 Ohio St. L.J. 1113, 1116-8 (1980); Commander, *Minimum Competency Testing: Education or Discrimination*, 14 U. Rich. L. Rev. 769, 772-3 (1980).

133. For a discussion of these and related issues see Alberts, Minimum Competency Testing (1984) (doctoral dissertation St. John's University).

134. The remaining sections of this chapter are loosely based on a related article prepared by Thomas entitled *The Legal Basic of Minimum Competency Testing*, Educators and the Law, at 11-24 (Thomas, McCarthy, & Cambron-McCabe, eds. 1983).

regarding exit criteria, subjects to be taught, and matters of pedagogy.[135] When decisions of educators are challenged, courts generally are reluctant to intervene in school affairs and show great deference to the expertise of educators unless school policies or decisions are arbitrary.[136] Justices are concerned that their involvement in educational evaluation may encumber the operation of schools; that judicial review may deteriorate many beneficial aspects of the student-teacher relationship; that courts are unqualified to deal with subjective measures of academic performance; that judicial action may encourage the filing of a myriad related complaints; and that court intervention may usurp the authority of legislatures and educators to design educational policies, standards, and requirements.

Courts which have dealt with MCT issues have had "nothing but praise" for efforts to improve the quality of education.[137] One court observed that "to establish a standard that would make a high school diploma . . . a meaningful credential . . . is clearly within the authority and power of [the board]."[138] In a recent case, the Seventh Circuit ruled that the "district's desire to ensure the value of its diploma by requiring graduating students to attain minimal skills is admirable," and that "the courts will interfere with educational policy decisions only when necessary to protect individual statutory or constitutional rights."[139]

In summary, federal and state courts overwhelmingly have concluded that states have the right to develop reasonable means to determine the effectiveness of their educational programs with respect to *all individual students* to whom they issue a diploma.[140]

Reliability and Validity

Once it is determined, given certain constraints, that the state has the authority to require students to pass a competency test prior to graduation (or promotion), it then is necessary to develop or select a test with acceptable levels of reliability and validity. Without such qualities, the instrument selected may not accurately measure the

135. *See, e.g.*, Board of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978); Foley v. Benedict, 55 S.W.2d 805 (Tex. 1932).

136. *See, e.g.*, James v. Board of Educ. of the City of New York, 42 N.Y.2d 357 (N.Y. 1977).

137. Debra P. v. Turlington, 644 F.2d 397, 402 (5th Cir. 1981).

138. Board of Educ. of Northport — East Northport Union Free School Dist. v. Ambach, 458 N.Y.S., 2d 680, 684 (N.Y. App. Div. 1982).

139. Brookhart v. Illinois State Bd. of Educ., 697 F.2d 179, 182 (7th Cir. 1983).

140. *See, e.g.*, Brady v. Turlington, 372 So. 2d 1164 (Fla. Dist. Ct. App. 1979).

desired skill or knowledge, but rather may reflect varying degrees of error in addition to any true measure of achievement or aptitude.

Reliability is simply the accuracy or precision of the measuring instrument; the less error in the measurement, the greater the reliability. Without reliability, relations between variables cannot be measured accurately and, therefore, results are not dependable either as a standard for graduation or as a guide for remediation. High reliability is not a guarantee of useful test results (other factors like validity must be considered), but, without it, there can be no dependable results and no defensible use of test scores where either property or liberty rights are threatened.[141]

If a test has validity it measures what it purports to measure. This quality is different from reliability in that it is concerned with the accomplishment of the objectives of the instrument rather than with the accuracy of the measurement. Accordingly, a test may be reliable in that it provides accurate, dependable, and stable information, but may lack validity because it does not measure what it intended to measure. If a student does not score sufficiently high on a competency test designed to measure the acquisition of life skills, the performance may be a result of inadequate instruction to achieve that objective, low competency, or invalid measurement. As a result, tests lacking instructional validity are of little value to educators, because scores do not necessarily reflect student ability.

There are numerous types of validity dependent upon the inferences drawn from the test scores. Instructional validity, a form of content validity, is of particular importance when examining MCT issues; it is a measure of whether educators are providing instruction in the areas measured by the test. Establishing instructional validity does not require educators to expose students to the exact questions of a test, but does mandate that efforts are made to develop the skills and to impart the information that is necessary to answer related test items.

In *Debra P. v. Turlington*, the Florida State Legislature required all graduating students to complete a minimum number of class credits and to master certain basic skills.[142] To determine whether basic skills were acquired, passage of a state-prepared examination was required. The state had not conducted formal studies to support a finding of instructional validity for the examination, but assured the court that the test covered material taught in the classroom.

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141. Kerlinger, Foundations of Behavioral Research, at 455 (2d ed. 1973).
142. 644 F.2d 397 (5th Cir. 1981).

Nevertheless, without formal proof the court was unwilling to "assume" that a relationship existed between that which was taught and that which was tested. The court found the test to be "fundamentally unfair" and concluded that although the test may be used for remediation purposes, it may not be used to deny a diploma until validity is established. (Blacks had failed the test in disproportionate numbers; however, no handicapped students were involved as plaintiffs.)

In *Anderson v. Banks*, a district court made every effort to distinguish this Georgia case from *Debra P.*, noting that the California Achievement Test (CAT) is a reliable and well-established instrument developed over a period of years.[143] Nevertheless, the court succumbed to the strong language and direction provided by the Fifth Circuit and concluded that where the receipt of a diploma is dependent upon the successful completion of a test, the burden is on school authorities to support a finding that the test has instructional validity. Because empirical data had not been generated to support such a claim, the use of the CAT as an exit criterion was ruled to violate due process.[144] However, the court upheld the future use of valid competency tests to deny diplomas to all children who do not perform satisfactorily, including handicapped children who are working within their respective IEPs and are never exposed to content similar to that covered on the test. The court did not require that instructional validity be based on IEPs, but rather required that it reflect the basic curriculum available to students in the mainstream.

Legal issues involving validation also were addressed in *Board of Educ. of Northport — East Northport Union Free School Dist. v. Ambach*.[145] In that New York State case, the court noted that the availability of a free appropriate public education was not disputed. Instead, two handicapped plaintiffs challenged the decision of the Commissioner of Education to invalidate their diplomas because they had not passed the required competency examination. The court observed that the test was constructed so that the average ninth grade student could answer correctly 80% of the questions and rejected the unsupported claim of the plaintiffs that the test was invalid. The court did not require the state to prove that its test had instructional validity because, unlike the situations in *Debra P.* and *Anderson*, no prior *de jure* race discrimination had occurred. Accord-

143. 520 F. Supp. 472 (S.D. Ga. 1981).
144. *Id.* at 509.
145. 458 N.Y.S.2d 680 (N.Y. App. Div. 1982).

ingly, the "content validity of the basic competency tests more than adequately [resisted a] challenge on due process grounds."[146]

Unlike the cases discussed above, some courts have avoided the validation issue when possible. For example, in *Brookhart v. Illinois State Bd. of Educ.*, the Seventh Circuit restated the position taken in *Larry P. v. Riles*[147] that the "purpose of validation is to determine whether tests are suited to the purpose for which they are used with respect to a particular testing population."[148] It further noted that the Rehabilitation Act and the EHA require that tests, at least for evaluation and placement, reflect the student's aptitude or achievement level, rather than his impaired sensory, manual, or speaking skills. However, the court did not indicate whether tests used for graduation purposes also must reflect individual ability, nor did it reach closure on whether the use of tests that have not been validated based on individual IEPs violated federal law.

When viewed collectively, the aforediscussed cases indicate that permissible MCTs must have proven instructional validity based on information imparted or skills acquired in the mainstream, if a property or liberty right has been violated. Validation is not necessary if the test is used only for remediation or administrative purposes. Furthermore, tests do not have to be validated for each IEP.

Discrimination

Handicapped students, as a group, perform less well than nonhandicapped students on MCTs and, therefore, more often are ineligible for a diploma. Because MCTs do not measure competence within IEPs and because diploma sanctions disproportionately impact on handicapped students, claims of discrimination have emanated. Plaintiffs have proponed fourteenth amendment (equal protection) and Rehabilitation Act (section 504) violations.

Equal Protection Clause

As discussed in chapter 1, public education is of "fundamental importance," but is not a fundamental right under the Federal Constitution; furthermore, although handicapped persons meet many of the criteria for suspect status, they have not been labeled as either a suspect class or a quasi-suspect class by federal appellate courts. As a

146. *Id.* at 688.
147. 495 F. Supp. 926, 968-73 (N.D. Cal. 1979).
148. 697 F.2d 179, 184 (7th Cir. 1983).

result, decisions of educators or legislators that may disproportionately impact on handicapped students are likely to be declared constitutional unless they are ruled not to be rationally related to a legitimate governmental objective (i.e., strict scrutiny will not be applied). In such cases, the burden of proof is on the plaintiff to support the position that the practice is not rational; however, few plaintiffs have been able to shoulder such a burden. The courts overwhelmingly have supported the right of the state to establish graduation standards (among others), and consistently have denied allegations that the use of competency tests to "make a high school diploma meaningful" is not rationally related to the objective of providing for quality public schools.

Even if courts in future cases were to adopt the intermediate scrutiny test (must serve an important governmental objective and must be substantially related to the achievement of that objective), it still is doubtful that the direction of case law would be altered. Students challenging MCT-based diploma sanctions are not being denied an education (or a free appropriate education for those who are handicapped); they simply are being required to demonstrate certain competencies if they are to be provided with a diploma. Such a requirement is likely to withstand the middle tier test as well as the lower tier, rational basis test.[149] However, if handicapped students are denied the opportunity to take an MCT, or if the tests are not modified to accommodate their physical limitations, it is probable that such practices do not meet even the rational basis test and that the equal protection clause is violated.

Section 504

It also is unlikely that handicapped students who fail an MCT will be able to support a claim of discrimination under section 504. The Rehabilitation Act stipulates that no otherwise qualified handicapped person may be excluded from participation in, be denied the benefits of, or be subjected to discrimination by recipients of federal financial assistance.[150] Accordingly, when handicapped students do not receive a diploma from a public school (a recipient of federal assistance) due to test failure, they typically claim that they are being denied a benefit and are victims of discrimination because of their handicaps. This position, however, has not been accepted by the courts.

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149. *See* McCarthy, *The Application of Competency Testing Mandates to Handicapped Children*, 53 Harv. Educ. Rev. 146, 149-50 (1983).

150. 29 U.S.C. sec. 794 (1983) (regulations are codified at 34 C.F.R. 104 (1983)).

In 1979, the United States Supreme Court ruled in *Southeastern Commun. College v. Davis*, that for a handicapped person to be otherwise qualified, he must be qualified *in spite of his handicap.*[151] However, when a handicapped student fails the examination and does not receive a diploma, he is not qualified in spite of his handicap. Furthermore, educational institutions are not required to lower or substantially modify their standards to accomodate handicapped students. For example, to alter the content of an MCT has been ruled to be a substantial modification, and is not mandated by either the legislature or the courts.[152]

Notice

The courts are not in total agreement as to whether a property or liberty interest has been violated when handicapped students are denied a high school diploma or are labeled as a "certificate recipient," rather than a "diploma recipient," assuming that they receive FAPE. As a result, educators remain unsure as to what process is due prior to the use of MCTs.

In *Debra P.*, a thirteen month notice was considered insufficient. The tests were used statewide in districts with a myriad curricular innovations, emphases, methods, strengths, and weaknesses, while little time was provided for remediation between establishing the test requirement and its first administration. The court reasoned that the state had created an expectation on the part of students that if they attended school and completed required courses, a diploma would be forthcoming, thus establishing a property interest as that term is used constitutionally.[153] Based upon this implied property right, the appeals court found the length of notice to be in violation of the due process clause of the fourteenth amendment.

In contrast to *Debra P.*, a twenty-four month notice in *Anderson* was considered sufficient due to the presumed general applicability of the CAT, the availability of remedial alternatives, and the ease of coordinating activities in a single district. The court did not support plaintiff's position that more time was necessary to master material which should have been learned in earlier grades. Plaintiffs argued that because they had been socially promoted without having acquired basic skills, it would be unfair to "deny a diploma on the basis

151. 442 U.S. 397 (1979).
152. Brookhart v. Illinois State Bd. of Educ., 697 F.2d 179, 184 (7th Cir. 1983)
153. *See* Goss v. Lopez, 419 U.S. 565 (1975).

of a requirement added at the eleventh hour."[154] The court disagreed and noted the availability and efficacy of the remedial program, the provision that the test may be retaken, and the motivational value of the diploma sanction.

In its analysis, the *Anderson* court observed that notice becomes constitutionally inadequate only when it renders the rule unreasonable. The court cited a Fifth Circuit case, *Mahavongsanan v. Hall*,[155] where a graduate student was not awarded a degree because she failed a comprehensive examination which became a requirement after she had entered the program. In that case, the appeals court ruled that universities generally are not subject to the supervision or review of the courts in the uniform application of academic standards and related reasonable regulations.[156] The *Mahavongsanan* court found the exit requirement to be reasonable and plaintiff's demands to be without a constitutional basis. Similarly, the *Anderson* court found the diploma requirement to be reasonable and the notice to be adequate. The court observed that "[n]o one [can] seriously contend that academic requirements [can] never be changed during the twelve years a child typically spends in school."[157]

In *Ambach*, a New York State court not only found a three year notice to be adequate, but also rejected the argument that a property or liberty right had been denied handicapped students. The court noted that a property right exists only when there is a legitimate claim of entitlement.[158] Because neither plaintiff was ruled to be capable of completing the graduation requirements, and because the district performed no acts that would create such an implied right, neither plaintiff should have developed an expectation of receiving a diploma. The three year notice was of sufficient length to permit IEP changes, where appropriate. However, IEP alterations were not necessary for the plaintiffs, because "[n]o period of notice, regardless of the length, would be sufficient to prepare [them] for the basic competency tests now required . . . ."[159] The court did note, however, that future plaintiffs with "remedial handicaps" may have the ability to pass the examination and may, therefore, have property rights that may be compromised. In such cases, the court would balance the

154. Anderson v. Banks, 520 F. Supp. 472, 506 (1981).
155. 529 F.2d 448 (5th Cir. 1976).
156. *Id.* at 449-50.
157. Anderson v. Banks, 520 F. Supp. 472, 506 (1981).
158. 458 N.Y.S.2d at 686. *See also* Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
159. 458 N.Y.S.2d at 686.

private and governmental interests and the risk of improper deprivation of such rights. Even where such circumstances are present, however, a three year notice still would be sufficient, according to the court.

The *Ambach* court also observed that liberty rights are violated only if the stigmatizing statement is false[160] and if it is made public by a governmental entity.[161] In the present case, no public statement was provided, while the plaintiffs were indeed unqualified to receive a standard diploma, because they had not met each of the graduation requirements.[162]

The Seventh Circuit in *Brookhart* provided a rationale contrary to that in *Ambach*. That court ruled that by changing the diploma requirement, and by providing only one and one half years notice for students to prepare for the MCT, the district deprived failing individuals of both property and liberty rights. Although the court was unwilling to define adequate notice in terms of a specific number of years, it did stipulate that the district must ensure that handicapped students be exposed to most of the test material, or show that a well-informed decision was made not to pursue an MCT-based program. In peroration, the court observed that "the due process right is not a right to a diploma . . . , but rather a right to adequate notice in order to prepare for the new requirement. Thus the appropriate remedy for the denial of this right is an extended period for preparation."[163]

Conclusion

In an attempt to re-establish the credibility of the high school diploma and to acquire support for public education, many states have turned to minimum competency tests as a means to identify students in need of remedial assistance and to restrict the receipt of a high school diploma. It is within the authority of the state to impose such a requirement presuming adequate notice has been provided and selected tests have proven reliability and instructional validity. While all students have the right to take the tests (in modified form if necessary) in order to qualify for a diploma, school districts need not establish separate standards or prepare individualized tests for special need students. Although students working within IEPs often

160. Codd v. Velger, 429 U.S. 624, 627 (1977).

161. Bishop v. Wood, 426 U.S. 341, 348 (1976).

162. *See also* Lenfant v. District of Columbia Bd. of Educ., No. 80-1333, 3 EHLR 552:272 (D.D.C. Dec. 1980) where a handicapped child was not entitled to an ordinary diploma, because she did not complete the necessary units.

163. Brookhart v. Illinois State Bd. of Educ., 697 F.2d 179, 188 (7th Cir. 1983).

are not exposed to as much of the test material as are nonhandicapped students, the courts have not found this occurrence to violate either the equal protection clause or section 504.

Parents of handicapped children are responsible for working with the placement committee as it determines the components of their child's IEP. They should be made aware of the general content of the tests, where and how they are to be administered, and for what purpose the results are to be used. Following the evaluation period, and prior to the placement, a decision should be made regarding the appropriateness of including MCT material within the child's IEP. If the committee determines that such content is not appropriate, the parent may always appeal the decision to an impartial hearing officer. If educators routinely follow these practices, future MCT cases will be less likely to include handicapped children.

6

Physical Education and Sports Participation

Handicapped students have the right to a free appropriate public education (FAPE) in the least restrictive environment. Although it is clear that a school district is not required to provide a handicapped child with the best education available (or even one that would maximize his potential commensurate with the opportunities provided a nonhandicapped child), the district still is responsible for providing an appropriate program.[164] In providing such a program, the responsible committee routinely includes physical education in each child's IEP, if the child is capable of participating. Furthermore, qualified handicapped students may not be denied the right to participate in non-IEP sports.

Physical Education

The physical education services which are made available to each handicapped child may have to be specially designed, but may not be separate from those available to nonhandicapped students, unless they can not otherwise be effectively provided. Where the IEP committee has included physical education within a child's program, a court will not withdraw the child thereby substituting its judgment, or the judgment of the members of the school board, for that of the responsible committee. Similarly, if a school board were to disregard a recommendation of the IEP committee and limit or omit physical education from the program of one of its handicapped children, or were to segregate the classes to which the child was assigned, such an act would not survive the initial administrative appeal (impartial hearing officer), nor would it be sustained in a court of law.

Non-IEP Athletic Participation

In addition to participating in an IEP-based physical education program, federal regulations (section 104.37(c)(1)) require that

164. Board of Educ. of the Hendrick Hudson Cent. School Dist. v. Rowley, 458 U.S. 176 (1982)

qualified handicapped students also have the right to participate in non-IEP activities including classes, clubs, intramural athletics, and interscholastic teams. Where a handicapped child meets all of the requirements of an activity *in spite of his handicap*, he may not be denied the opportunity to be involved. However, exclusion still may be based on comparative ability, sportsmanship, grade point average, age, residency, and the like.

Case law regarding the right to participate in non-IEP programs is less clear and consistent than the case law involving enforcement of the IEP, particularly where there exist conflicting organizational policies or state statutes, or where there is a risk of injury to the handicapped student or to other participants.

Conflicts with Policies and Statues

Given that public education is a responsibility of the individual states, each state may make and enforce rules regarding the entire curriculum, including physical educaton and sports participation. As an arm of the state, the local school board generally is authorized to develop additional rules or regulations, assuming that such provisions are not contrary to state or federal laws. Furthermore, many states permit local districts to organize for sports regulation purposes and to delegate to the organization the responsibility of making, promulgating, and enforcing regulations that are necessary for its efficient operation. Where a rule is challenged, the courts will be concerned with whether the rulemaker's authority was properly delegated; whether the specific provision being questioned was within the authority granted; and whether the rule was reasonable.[165] Two recent cases illustrate alleged conflicts between organizational policies and federal laws.

The Executive Committee of the University Interscholastic League (UIL) is the rule and policy making body for most interscholastic public school athletic competition in the state of Texas. Its policy regarding transferring athletes stipulates that a student changing schools, whose parents or guardians do not reside in the district, is ineligible for varsity contests, and that a student living with a guardian is eligible only if the guardianship is of one years standing. The policy was intended to help limit recruiting abuses and to reduce the competition for high school athletes but, when applied uniformly, could result in restricting the involvement of students

165. *See* De Santis, *The Disabled Student Athlete: Gaining a Place on the Playing Field*, 5 Comm/Ent L.J. 517, 519 (1983), for a related discussion.

who transferred for reasons other than for athletics. There were no exceptions to the policy and no procedures by which individual cases could be given special handling.

This policy was challenged in *Doe v. Marshall*, where a federal district court concluded that the handicapped plaintiff had a "compelling necessity" for living apart from his parents and a "compelling need" to participate in football, if he ever was to become a normal, productive adult — a conclusion of plaintiff's therapist, not of the evaluation committee.[166] The court based its decision on the position that the district had failed to adequately evaluate the student's individual needs, thus failing to provide him with a free appropriate public education. As a result, the court issued an injunction restraining the district from barring plaintiff from participating. The student had persuaded the court that his case had a reasonable probability to prevail on its merits and that, on balance, the injury he would incur without the issuance of an injunction would outweigh any possible injury to the district.

It should not be assumed, based on this isolated case, that handicapped students are not required to meet residency requirements. Handicapped students must be qualified in both ability *and* eligibility. Although the court ruled that the plaintiff had a legitimate educational and emotional need to be involved in athletics, that type of conclusion generally is provided by professional evaluators and not by the court. However, when a responsible committee, following its evaluation, concludes that an *otherwise qualified* student's IEP should include interscholastic participation, it then would appear that an exception to the general residency requirement would indeed exist. Nevertheless, even this exception would become less absolute where it is proven that the primary factor motivating the transfer was to participate in a particular district's athletic program. Furthermore, where an IEP requires only physical education, and not interscholastic participation, it is not likely that a student's mere "desire" to play (without a demonstrated "need" to play) would outweigh the necessity to uniformly administer residency requirements.

A second related case, *Mahan v. Agee*,[167] involved a regulation adopted by the Oklahoma Secondary Schools Activities Association (OSSAA) stipulating that any student who reaches his nineteenth birthday prior to September 1 is not eligible to play in interscholastic sports in any of its 490 member schools. In support of the age

166. Doe v. Marshall, 459 F. Supp. 1190 (S.D. Tex. 1978).
167. 652 P.2d 765 (Okla. 1982).

limitation, the association noted that older and more mature athletes could constitute a danger to the safety of younger students, and that an age restriction would reduce the likelihood that an athlete would voluntarily repeat a grade in order to gain an advantage in competition (i.e., red-shirting would be better controlled).

The age limitation was challenged by a nineteen year old handicapped senior who was ruled ineligible to play. The student claimed that if the district had provided him with a FAPE during his fourth grade year (the year he moved to the district), he would not have been required to retake the grade and would not, at this time, be a nineteen year old senior.

In rendering its decision, the court noted that school districts in Oklahoma have the authority to join athletic associations, while such organizations possess the authority to make and enforce eligibility requirements. Also, the court found the regulation to be reasonable, lawful, and in keeping with public policy. The court reasoned that if the governing board interprets its regulations fairly and enforces them uniformly, there is no reason to interfere. Furthermore, there was no violation of section 504, because the plaintiff was not ruled ineligible because of handicap; he was ruled ineligible because of age.

Risk of Injury

Unlike facially neutral residency or age requirements, school districts also have been charged with promulgating and administering guidelines which result in the screening out of handicapped athletes based solely on their respective handicaps. For example, numerous state education departments have adopted an American Medical Association (AMA) publication, "A Guide for Medical Evaluation of Candidates for School Sports," to be used by school physicians and administrators. Included within this publication is a list of conditions the AMA considers to be disqualifying for participation in contact sports. Where these guidelines are rigidly adhered to, a student athlete could be qualified in spite of his handicap, yet not be allowed to play. Where this has occurred, numerous cases have resulted.

In these cases, the district routinely argues that students with selected handicaps who are permitted to participate (1) may increase the chance of personally sustaining an injury, (2) may increase the probability of injury to other participants, or (3) may not be acting in their own best interest, balancing both the benefits of participation and the possibility of severe injury.

Students generally respond to such claims by purporting (1) that they are sufficiently mature to judge the advantages and disadvan-

tages of participation, or that they have parental consent; (2) that they are "otherwise qualified" to participate, as defined by section 504; (3) that the parents and the student, and not the district, should be responsible for making such a decision; and (4) that the district will not be held liable for injuries sustained by the handicapped student while participating in the sport.

Federal Cases. Although numerous district court decisions exist, *Kampmeier v. Nyquist*[168] represents the only federal circuit court decision to date on this topic. In that case, two junior high school students, each with vision in only one eye, were denied the opportunity to participate in contact sports based solely on their handicap. Approval from the school medical officer is required under New York State law before *any* student is allowed to participate in interscholastic athletics. Although blindness in one eye is among the conditions identified by the state Commissioner of Education as a disqualifying condition for participation in contact sports, the physician also is required to consider the risks of the particular contact sport in question, the athletic fitness of the candidate, availability of special equipment, possible preventative measures, and supervisory control. Accordingly, the commissioner's guidelines are only advisory, while decisions must be based on individual circumstances.

In reaching its decision, the Second Circuit Court of Appeals reasoned that section 504 permits the exclusion of handicapped children if there exists a substantial justification, and that public school officials, under *parens patriae*, have the responsibility to ensure, to the best of their ability, the well-being of students. To restrict the participation of sight impaired students to noncontact sports in order to reduce the potential for injury to each child's remaining eye appeared rational to the court, given that no medical or statistical evidence was presented by the plaintiffs to support the position that such preventative measures were unnecessary given the remote possibility of injury. Accordingly, the court affirmed the district court decision denying plaintiff's motion for a preliminary injunction which would have barred the district from preventing the students from participating.

A 1980 federal district court decision, *Poole v. South Plainfield Bd. of Educ.*,[169] also is of note. In that case, the plaintiff was seeking compensatory damages against the local board because he had been denied the opportunity to participate in the wrestling program due to

168. 553 F.2d 296 (2d Cir. 1977).
169. 490 F. Supp. 948 (D.N.J. 1980).

his handicap (one kidney). He had wrestled for three years (eighth, ninth, and tenth grades), but was restricted from such activity during the eleventh and twelfth grades. The student's parents supported him having the opportunity to wrestle and were willing to sign a waiver of liability. Following the board decision denying him the right to participate, the plaintiff unsuccessfully appealed the decision to the New Jersey Commissioner of Education. By the time the case was heard in federal court, plaintiff had graduated making injunctive relief inappropriate.

After its review of the case, the court made several conclusions regarding section 504: there exists a private cause of action; monetary as well as injunctive relief is available; and interscholastic athletic programs must be in compliance with the Act, even if no federal funds are spent specifically on interscholastic athletics. In arriving at these conclusions, the court observed that medical testimony was divided regarding whether it was advisable for a student with one kidney to wrestle, but that the plaintiff should be given "the benefit of all doubts."[170] The board decision, although well intended, was contrary to the informed wishes of the student and his parents and "[stood] the doctrine of *in loco parentis* on its head."[171] Ordinarily, that doctrine assumes that the parents are absent and that it is necessary for the board to act in their place; but, in this case, all involved persons were present and well informed. Although the state may at times disregard the wishes of parents, there need to be mitigating circumstances making it essential for the continued care of the child.

In concluding that section 504 had been violated and that plaintiff was otherwise qualified, the court proponed that

> [h]ardly a year goes by that there is not at least one instance of the tragic death of a healthy youth as a result of competitive sports activity. Life has risks. The purpose of section 504, however, is to permit handicapped individuals to live life as fully as they are able, without paternalistic authorities deciding that certain activities are too risky for them.[172]

To the court, the board's duty is *to inform* the student and his parents of the risks and *to require* them to "deal with the matter rationally."

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170. *Id.* at 952.
171. *Id.*
172. *Id.* at 953-54.

In 1981, a university level case, *Wright v. Columbia Univ.*,[173] which was similar to *Poole* was filed in federal court. The student was sighted only in one eye but was, nevertheless, an otherwise qualified participant. Notwithstanding his handicap, plaintiff was capable of meeting all of the requirements of the football program and was fully informed regarding potential injury and risk. Furthermore, the plaintiff and his parents were willing to sign a waiver of liability should he be injured while involved in the sport.

The court agreed with the rationale proposed in *Poole* that the football program is not outside the coverage of the Rehabilitation Act, even though it did not directly receive federal funding, and distinguished the present case from *Kampmeier* in that the plaintiff had presented evidence to rebut the university's position and that he was sufficiently old, mature, and informed[174] as not to require the institution to be *in loco parentis*. The court also concluded that the plaintiff would incur irreparable harm if a preliminary injunction was not issued and that plaintiff had garnered a *prima facie* case showing a reasonable probability of success on its merits.[175]

In a district court decision, *Grube v. Bethlehem Area School Dist.*,[176] a preliminary injunction was sought prohibiting the school district from denying a student with one kidney the right to play football. The student had a history of athletic participation and, except in regard to his lack of a second kidney, was physically fit and otherwise qualified to participate. He previously had suffered a minor injury to his remaining kidney, but had purchased a specially designed "flack jacket" which would offer additional protection. Nevertheless, the school physician, in consultation with two other physicians, recommended that the plaintiff be barred from playing football. The student had the permission of his parents and supportive testimony from Dr. Moyer, the director of the Sports Medicine Clinic at Temple University and a certified orthopedic surgeon. In Dr. Moyer's opinion, the position held by the other physicians was emotional, rather than medical.

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173. 520 F. Supp. 789 (E.D. Penn. 1981).

174. *See also* Evans & Redding v. Looney, No. 77-6052-CV-SJ (W.D. Mo. 1977) (where two college students with sight only in one eye were denied the opportunity to play football); and Borden v. Rohr, No. C275-844 (S.D. Ohio, Dec. 30, 1975) (oral decision) (where the court provided a preliminary injunction to allow a state university student who was sighted only in one eye to play intercollegiate basketball).

175. *See also* Suemnick v. Michigan High School Athletic Ass'n, No. 4-70592 (E.D. Mich. 1974) (where high school authorities were enjoined from preventing a student with one leg from playing varsity football).

176. 550 F. Supp. 418 (E.D. Pa. 1982).

The district court, although admittedly reluctant to "disturb a well-intended decision of local school authorities,"[177] asseverated that the board should not have based its decision on the recommendations of medical doctors who had neither the practical experience nor the research background to evaluate the risk to plaintiff, particularly since creditable evidence from a noted authority had been presented. Accordingly, the court granted a preliminary injunction, given the likelihood of success on the merits of the case and the irreparable harm predicted by plaintiff.

The existence of taciturn courts giving great deference to decisions of educators historically has been the rule, rather than the exception. Such courts have been reluctant to substitute their opinions or judgments for those derived in good faith by school officials. As the district court cases previously discussed indicate, however, this position has been weakened regarding decisions involving handicapped student athletes due to the courts interpretation of the mandate of section 504. On the state level, a similar trend has occurred where administrative rulings frequently are being overturned by state courts based on state, rather than federal, law. New York State provides a good example, given its abundance of cases on this topic.

State Cases. New York State Education Law (section 310) states that decisions of the state Commissioner of Education are final unless shown to be purely arbitrary. In a related case, *Spitaleri v. Nyquist*,[178] a student with a visual impairment was medically disqualified from participating in football. The disqualification was based totally on plaintiff's handicap while he was otherwise qualified to participate. Also, he and his parents were willing to sign a waiver of liability. Nevertheless, the court upheld the Commissioner's decision (based on uncontradicted medical evidence — AMA recommendation and school physician opinion), which was found to be in the best interest of the petitioner.

In a second case, *Colombo v. Sewanhaka Cent. High School Dist. No. 2*,[179] the child was hearing, rather than visually, impaired, while the plaintiff submitted substantial testimony from a variety of witnesses that supported his eligibility. (Included among his supporting witnesses were an administrator at Gallaudet who also was the president of the International Committee of Silent Sports, a former superintendent of a state school for the deaf, a parent of two hearing

177. *Id.* at 423.
178. 345 N.Y.S.2d 878 (N.Y. Sup. Ct. 1973).
179. 383 N.Y.S.2d 518 (N.Y. Sup. Ct. 1976).

impaired children who currently were participating in contact sports, and a noted physician who also was chairman of the Committee on the Medical Aspects of Sports of the Medical Society of New York.) However, although plaintiff's own otologist reported that he could participate in contact sports if he wore a specially designed helmet, the physician still warned that, in his opinion, even a small risk was unacceptable because injury could result in a "disabling handicap." This latter position also was supported by recognized medical publications and the AMA recommendations. The court reasoned that it is

> abundantly clear that there are at least conflicting views with respect to whether [plaintiff's] participation in contact sports represents a danger to his physical well-being or to the safety of other students .... A determination of an administrative body, made on a rational basis, should not be judicially set aside.[180]

The court concluded that the board used "sound judgment" in arriving at its decision.

Contrary to the decisions discussed above, not all administrative judgments have been ruled to be sound. In *Prendergast v. Sewanhaka Cent. High School Dist. No. 2*,[181] a decision of the school medical director was overturned. The student bringing suit was absent a paired organ, yet wanted to participate in contact sports. Because the lone remaining organ (a testicle) could be substantially protected by the wearing of a proper guard, and because neither the plaintiff nor other participants could conceivably be injured due to plaintiff's participation, the court found him to be qualified to participate. The court also distinguished between the severity of the loss of a second testicle to the loss of a second eye or kidney, or the loss of hearing in the second ear.

In spite of this last decision, it is obvious that if handicapped athletes are required to prove that a decision is plainly arbitrary, as required by section 310, it is unlikely that many will be able to meet such a demanding standard.[182] Futhermore, several handicapped athletes are capable of participating with virtually no greater threat to health or safety than is present for other athletes. Accordingly, the New York State Legislature, in light of earlier case law and of section 504, passed section 4409 of the State Education Law. That statute permits a plaintiff to commence a special proceeding in the supreme

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180. *Id.* at 521.

181. Prendergast v. Sewanhaka Cent. High School Dist. No. 2, Slip Op. Unpublished (N.Y. Sup. Ct., Nassau Cty., May 14, 1975). *Cited in* Colombo *supra* note 179.

182. Alberts, *Section 504 of the Rehabilitation Act and the Right to Participate in School Athletic Programs*, 11 Educ. Considerations 23 (1984).

court (state trial court) to enjoin the school district from prohibiting athletic participation. The petition must have annexed affidavits of at least two licensed physicians stating that in their opinion the student is physically capable of participating in an athletic program, and that participation would be reasonably safe. Also, any special or preventive measures or devices needed to protect the student are to be identified by the physicians.

In 1978, a plaintiff with defective vision in one eye was denied the opportunity to participate in contact sports because, in the opinion prepared by the school physician, participation would not be reasonably safe. He did not base his position on the likelihood of injury (particularly with protective glasses), but rather considered the nature of the handicap and the severity of possible injury. In this case, *Kampmeier v. Harris*,[183] the plaintiff provided two affidavits of physicians expressing the opinion that he was capable of participating in contact sports and that such involvement was reasonably safe. Accordingly, the court concluded that it was in plaintiff's best interest to participate. Other section 4409 cases have been resolved in like manner.[184]

Policy Implications

Authorized committees of the local educational unit are responsible for determining the nature and extent of the physical education curriculum which is made available to a handicapped child. The appropriateness of these offerings can be challenged both administratively and judicially. However, where a child has been thoroughly evaluated and placed in a program designed to meet his unique educational needs, challenging such a program would prove difficult.

In addition to the IEP, the handicapped child has the right to participate in extracurricular, intramural, or interscholastic activities if he is qualified in spite of his handicap. Where school officials feel that it is not advisable for a particular student to participate in a given sport, the student would be responsible for rebutting the position of the district.

In states like New York, where state statutes are controlling, challenging a board's decision would prove easier than in states without such regulations. In states where only federal statutes or the Federal Constitution are relied upon, judges may become the final arbiters in

183. 411 N.Y.S.2d 744 (N.Y. App. Div. 1978).

184. *See, e.g.*, Swiderski v. Board of Educ., City School Dist. of Albany, 408 N.Y.S.2d 744 (N.Y. Sup. Ct. 1978).

determining what is in the best interest of the child. Nevertheless, it appears that a qualified handicapped student who has acquired consent from his parents and supportive statements from knowledgeable physicians is likely to win judicial support.

Future litigation can be avoided if responsible committees, boards, physicians, parents, and students work together identifying appropriate activities, protective devices, and the like. Furthermore, given the pro-athlete trend of the courts, students and parents should be fully informed regarding the nature and extent of possible injuries, because only they can determine if participation is "worth the glory."[185]

185. Poole v. South Plainfield Bd. of Educ., 490 F.2d 948, 952 (D.N.J. 1980).

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